Creating Competitive and Informative Campaigns: A Comprehensive Approach to "Free Air Time" for Political Candidates

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I. INTRODUCTION

Numerous dysfunctions plague the current system of campaigns and threaten the proper operation of the democratic process in the United States. The cost of mounting a campaign with any chance of success has risen dramatically over the past thirty years, largely driven by the skyrocketing costs of political advertising on broadcast television stations. These advertisements are the primary means through which candidates communicate with voters, particularly as broadcast stations consistently reduce the amount of free news coverage they offer candidates and campaigns. The ever-increasing cost of the most widely used tool for communicating with voters has a powerfully harmful effect on the healthy operation of the democratic process: Challengers, who typically have access to less fundraising resources than incumbents unless they are personally wealthy, often cannot raise sufficient funds to purchase the amount of advertising necessary to mount an effective campaign. Consequently, voters receive less of the information they require to be aware of candidates, evaluate them, and make informed decisions. Voters are left without a choice—either in effect, because challengers do not have enough resources to make voters aware of their candidacies and ideas, or in fact, because potential challengers are deterred from even entering a race as a result of their lack of resources.[1]

Over the years, presidents, members of Congress, commentators, and others

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1. The McCain-Feingold campaign finance reform measure, recently upheld by the Supreme Court, does very little to address these problems. Its focus on limiting both the amount of "soft money" that candidates can raise and the amount that outside groups can spend on certain forms of advertising does not empower challengers to compete effectively against incumbents, who ultimately remain advantaged under the new campaign finance system. *See, e.g.*, Akhil Reed Amar, *Conspiracy Of Silence*, AM. LAW., Oct. 1, 2002, at 69, 69 (describing McCain-Feingold as "an incumbent-protection provision, pure and simple"); Stuart Taylor, Jr., *More Rules for Democracy*, LEGAL TIMES, Dec. 15, 2003, at 60 (noting "McCain-Feingold probably reduces challengers' already-slim chances of defeating incumbents, whose natural advantages loom larger as party money becomes scarcer.")

have developed several proposals to address the information and competition deficits in campaigns by giving candidates "free air time." However, all of these plans have contained fundamental design flaws that undermine their effectiveness. For instance, in order to promote a particular type of campaign discourse, many proposals would only give candidates free broadcast time in certain forms, such as five- or thirty-minute blocks, or would limit use of the time to certain kinds of messages, such as live presentations by the candidates of their positions. By forcing candidates to engage in only a certain form or kind of advertising, these proposals would hamstring candidates' ability to compete in the marketplace of ideas and discourage them from considering non-traditional approaches to communicating with voters. Other proposals have relied on exhortations to broadcasters to voluntarily provide candidates with free air time, despite the clear tendency of profit-motivated broadcasters both to exploit loopholes in current laws designed to guarantee candidates low-cost access to the airwaves and to devote fewer and fewer resources to free campaign coverage.

Most importantly, these proposals have almost uniformly focused on the provision of free *broadcast* advertising time, particularly broadcast television advertising time. While broadcast advertising undoubtedly plays a key role in campaigns, other media, in particular the Internet and cable television, can be equally, if not more, valuable to many candidates. By providing candidates with only broadcast time, these proposals have failed to recognize the disparate needs of various candidates—depending on which office they seek and their geographic location—and the tremendous potential of other media to address the lack of information and competitiveness in today's campaigns.

In order to avoid the flaws of prior proposals and to create an approach that can achieve real change, an effective plan must give candidates the utmost flexibility to use the types of media that best meet their needs in the ways that they find most efficacious, while also encouraging them to use nontraditional media particularly well-suited for increasing competition and the exchange of information. This Note offers a comprehensive political media subsidization and reform plan that accomplishes those goals. Utilizing funds raised through the imposition of a spectrum use fee on broadcasters, this Proposal offers federal candidates resources to spend *on any type of advertising or promotional activity they want.* Unlike other plans, the Note's Proposal does not limit its subsidies to broadcast television advertising, but rather allows candidates to spend the money on radio, cable, billboards, direct mail, flyers, or the Internet. As a means to encourage candidates to make better use of the Internet in particular, the unique characteristics of which are especially conducive to increasing the amount of campaign information and the quantity and quality of candidate-voter interaction, the Proposal also offers candidates additional funds to be spent exclusively on online campaign activities. In addition, the Proposal

maximizes the value of the subsidies allocated both by reforming the lowest unit charge rule and by extending the reasonable access rule, which guarantees candidates the ability to buy advertising time, to cable. The various aspects of the Proposal, all of which would survive constitutional scrutiny, serve to increase the dissemination of information that voters need to make informed decisions about candidates and to reintroduce meaningful competition into elections.

Part II of this paper examines the role that the current law, through its numerous loopholes, and the media, through its advertising and news coverage policies, play in creating the current dysfunctions in the campaign system. Part III reviews previous free air time proposals and examines their strengths and weaknesses. Drawing upon that analysis, Part IV presents this Note's Proposal, which incorporates the best elements of earlier plans while adding novel features that substantially increase its relevance to the modern media environment. Part V explains the importance of one of the plan's key innovations—providing incentives to use non-traditional media—and demonstrates how it both increases the dissemination of campaign information and enhances meaningful competition in elections. Finally, Part VI reviews the legal issues surrounding the Proposal and explains why it is constitutional.

II. THE PROBLEM: THE ROLE OF LAW AND MEDIA POLICY IN CREATING DYSFUNCTIONS IN TODAY'S DEMOCRATIC PROCESS

Candidates' reliance on television advertising, particularly broadcast television advertising, has created a dynamic which inhibits the dissemination of information necessary for voters to make informed electoral decisions and contributes to a lack of meaningful competition between candidates. The rising use of television advertising has fueled the skyrocketing costs of campaigns. As television advertising has become an increasingly large expense in campaigns, government measures designed to guarantee candidates reasonably priced air time have become less and less effective. While television stations are reaping large amounts of revenue from the abundance of candidate advertising, they are reducing their free coverage of the campaigns. The combination of the high costs of communication and lack of free coverage creates large barriers of entry to challengers who cannot self-finance their campaigns and makes communication difficult for those non-wealthy challengers who do enter campaigns. Thus, in many of today's campaigns, voters often receive information only from incumbents or not at all—without viable challengers, many incumbents see little reason to engage in all but perfunctory campaigning. The result of this dynamic is less informative and less competitive campaigns, which essentially undermines the democratic process by denying voters the opportunity to make informed decisions between at least two candidates. This Note's Proposal for a comprehensive political media

subsidization and reform policy addresses these problems in an effort to facilitate the exchange of diverse ideas in, and reintroduce meaningful competition to, campaigns.

A. *Reliance on Television Advertising Has Fueled the Skyrocketing Costs of Campaigns*

Candidate spending on television advertising has dramatically increased over the last thirty years. In 1972, all local, state, and federal candidates, in both primary and general elections, spent $24.6 million on television advertising.[2] That figure reached $50.8 million in 1976 and $400 million in 1996.[3] Even when adjusted for inflation, the total amount spent on television advertising increased over 300 percent during the six presidential cycles from 1972 until 1996. In the last few election cycles, spending on television advertising grew at an exponential rate. The total spending on political television advertisements in 2000 amounted to more than $623 million[4] and reached a record high of slightly below $1 billion in the 2002 election cycle.[5]

These dramatic increases in spending on televised political advertisements constitute one of the main reasons for the overall rise in campaign spending. As the Committee for Economic Development stated, "The primary factor driving higher campaign spending has been the cost of television and other forms of advertising."[6] This echoes the view of academics who study elections[7] and the experiences of recent candidates who spend more and more of their resources on advertising. In competitive races for all federal offices and governorships in 2000, expenses for television advertising amounted to more than 50 percent of total campaign spending.[8] In sum, the past thirty years have seen a dramatic

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2. JOSEPH E. CANTOR ET AL., FREE AND REDUCED-RATE TELEVISION TIME FOR POLITICAL CANDIDATES 5 (Cong. Research Serv., Rep. No. 97-680, 1997).

3. *Id.*

4. These findings come from the Wisconsin Advertising Project, an ongoing study of political television advertising at the University of Wisconsin-Madison. Press Release, Wis. Adver. Project, Political Advertising Nearly Tripled in 2000 with Half-A-Million More TV Ads (Mar. 14, 2001), http://www.polisci.wisc.edu/tvadvertising/Press_Releases/Press_Release_PDFs/Release%202001%20March%2014th.pdf.

5. Press Release, Wis. Adver. Project, One Billion Dollars Spent on Political Television Advertising in 2002 Midterm Elections (Dec. 5, 2002), http://www.polisci.wisc.edu/tvadvertising/Press_Releases/Press_Release_PDFs/Release%202002%20December%205th.pdf.

6. COMM. FOR ECON. DEV., INVESTING IN THE PEOPLE'S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM 9 (1999), *available at* http://www.ced.org/docs/report/report_cfr.pdf.

7. *See, e.g.*, GARY C. JACOBSEN, THE POLITICS OF CONGRESSIONAL ELECTIONS 68 (4th ed. 1997) ("The feeling that television advertising is essential regardless of price is one important force driving up the cost of campaigning."); DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE 27 (1990) ("Much of the increase in [campaign] spending has been caused by the high cost of modern communications.").

8. PAUL TAYLOR & NORMAN ORNSTEIN, THE CASE FOR FREE AIR TIME: A BROADCAST SPECTRUM FEE FOR CAMPAIGN FINANCE REFORM 10 (New America Foundation, Spectrum Series Issue Brief No. 4, 2002), *available at* http:// www.newamerica.net/Download_Docs/pdfs/Pub_File_894_1.pdf.

increase in campaign spending, much of it due to expenditures on television advertising.

B. *The Lowest Unit Charge Rule Essentially Offers Candidates No Protection*

The ever-increasing amount spent on televised political advertising results in part from the failure of a government program designed to guarantee low-cost television advertising time to candidates. In 1971, Congress passed the "lowest unit charge" rule, which requires broadcast television stations, as a condition of receiving their licenses, to offer candidates a rate for advertising time that is no higher than the lowest rate it charges any other advertiser for the same type of advertising at the same time.[9] By enacting this law, Congress intended to provide candidates with greater access to the media and combat the increasing costs of campaigns by preventing stations from charging candidates any more than the rates offered to the most-favored commercial advertisers.[10]

However, the law contains a loophole that eviscerates its protections. Many commercial advertisers buy what is known as "preemptible time," which provides them no assurance that their advertisements will run at a particular time. If an advertiser buys preemptible time and the television station subsequently receives a better offer from another advertiser, the station can delay broadcasting the first advertisement.[11] Candidates, though, possess special needs as advertisers. Because campaigns only last for a limited time and circumstances and events change rapidly during that period, candidates need assurances that their advertisements will run at an exact time and during an exact program. For instance, if a candidate buys a thirty-second advertisement during *Friends* the week before Election Day, she requires that advertisement to air that night—and not on the *Friends* episode that airs the next week, after the election has passed. As a result, candidates must buy "non-preemptible" time, for which stations charge much higher rates.[12] The lowest unit charge rule does not prevent such practices because commercial advertisers generally do not buy "non-preemptible" time and thus do not set a lowest unit charge rate for

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9. 47 U.S.C. § 315(b) (2000).

10. Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 678, 687 (1991) (quoting S. REP. NO. 92-96 (1971)). The law also requires that broadcast stations provide "reasonable access" to candidates by permitting them to purchase "reasonable" amounts of advertising time. 47 U.S.C. § 312(a)(7) (2000).

11. The Federal Communication Commission noted this problem in 1988. *See* Licensees and Cable Operators Reminded of Lowest Charge Obligations, 4 F.C.C.R. 3823, 3823 (1998) ("Preemptibility enables the broadcaster to 'bump' an advertiser paying a lower preemptible rate in favor of an advertiser paying a higher preemptible rate .... Since both advertisers knew the spots they purchased were preemptible, no reason must be given by the broadcaster for a preemption.").

12. *Id.* ("[Non-preemptible] rates are higher than prevailing preemptible rates because they guarantee the airing of a spot at a particular time .... To avoid the vagaries of preemption, political candidates often choose to pay the higher non-preemptible rate.").

candidates.[13]

The U.S. Senate moved to address this problem in March 2001. By a vote of sixty-nine to thirty-one, it approved the Torricelli Amendment to the McCain-Feingold campaign finance bill.[14] This amendment would have permitted candidates to buy "non-preemptible" time at the lower "preemptible" rates charged most commercial advertisers. However, after extensive lobbying by the broadcast industry, the provision was not included in the Shays-Meehan campaign finance bill approved by the House of Representatives and was dropped from the bill reported out of the House-Senate conference.[15] As a result, the existing system essentially remains unchanged.[16]

Furthermore, the already high "non-preemptible" rates were driven even higher during recent campaigns as political parties and outside interest groups increasingly utilized "soft money" to buy advertising time. In 1998, political parties and interest groups ran only 66,586 advertisements. Two years later, they ran 409,496 advertisements.[17] Because of this increased demand, the cost of even "non-preemptible" time has risen dramatically. In 2000, the Center for the Study of Elections and Democracy at Brigham Young University conducted a study of seventeen media markets across the country that were home to competitive congressional and senatorial races. It found that from the end of August to the end of October, the cost of a thirty-second political advertisement tripled. In non-election years, advertising prices during the same period increased by approximately twenty percent.[18] This discrepancy indicates that "virtually all of the price spike in those markets in the fall of 2000 resulted from stations profiteering on the election-driven demand."[19] Therefore, not only do candidates have to pay the exorbitant "non-preemptible" rate for television advertising time, but the cost of such time is also being driven ever higher by non-candidate advertisers.[20] The protections offered by the lowest

13. TAYLOR & ORNSTEIN, *supra* note 8, at 11.

14. S. Amend. 122 to S. 27, 107th Cong. (2001). *See also* 147 CONG. REC. S2603-19 (daily ed. Mar. 21, 2001) (Senate debate on Torricelli Amendment).

15. TAYLOR & ORNSTEIN, *supra* note 8, at 11.

16. The Bipartisan Campaign Reform Act (BCRA) of 2002 does contain two provisions relating to the lowest unit charge. One denies candidates the lowest unit charge unless they promise not to refer to other candidates in their advertisements. Pub. L. No. 107-155, § 305, 116 Stat. 81, 100-03 (2002). Another requires radio and television broadcasting stations to maintain records of requests to purchase advertising time, whether by candidates or by others who want to air advertisements on political matters. These records must include the rate charged for the time and be open to the public. Pub. L. No. 107-155, § 504, 116 Stat. 81, 115-16 (2002). Nonetheless, neither of these provisions in BCRA addresses the underlying problems in the existing lowest unit charge system.

17. Press Release, *supra* note 4.

18. TAYLOR & ORNSTEIN, supra note 8, at 10.

19. ALLIANCE FOR BETTER CAMPAIGNS, GOUGING DEMOCRACY (2001), *at* http://www.bettercampaigns.org/reports/display.php?PageID=37.

20. Campaign finance reform recently enacted by Congress largely curtails the abilities of parties and outside groups to fund these advertisements. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 197-55, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.). While these measures were

unit charge rule offer candidates little protection from this price gouging.

Although this combination of circumstances creates hardships for candidates, it generates a windfall for local broadcast stations. Instead of considering the provision of reasonably priced air time to candidates as part of their public interest obligations, broadcast television stations view political advertising as a way to pad their bottom lines.[21] As noted above, candidates spent approximately $1 billion on televised political advertisements in the 2002 election cycle.[22] Media companies that own television stations increasingly rely on this money as a key source of revenue, particularly in the face of an otherwise weak advertising market. Many of the largest broadcast television station ownership groups—which also own numerous print and cable television outlets—attributed their revenue growth in the latter part of 2002 to political advertisements, including Gannett,[23] the Washington Post Company,[24] and Hearst-Argyle.[25] When Congress enacted existing laws regarding candidate access to broadcast television, it did so to ensure that candidates would not be shut out of television access. However, instead of denying candidates access, television stations now eagerly embrace candidate advertising—as a way to increase their profits by circumventing the spirit of the lowest unit charge rule.

C. *The Reduction in Free Coverage Fuels Candidates' Demand for Advertising*

Broadcast television stations contribute to the problem of advertisement costs not only by exploiting candidates' unique requirements as advertisers, but also by increasing candidates' need for the advertising time. Local stations have driven up demand for paid advertising time by severely cutting back on the

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recently upheld by the Supreme Court, the law still contains loopholes which allow supposedly independent groups, known as 527s, to raise and spend unlimited amounts of money on campaign-related commercials. *See* Glen Justice, *Kerry and Democratic Groups Accused of Finance Violations*, N.Y. TIMES, Apr. 1, 2004, at A20 ("527 committees, named for the section of the tax code that created them . . . collect unlimited 'soft money' contributions from companies, labor unions and wealthy individuals and use that money to finance advertisements, voter mobilization drives and other election efforts."). This spending by 527s will undoubtedly fuel the rising prices of non-preemptible advertising time in 2004 and future election cycles.

21. *See* Mark K. Miller & Dan Trigoboff, *Calm Before the Storm*, BROADCAST & CABLE, Apr. 7, 2003, at 27.

22. Press Release, *supra* note 5.

23. Frank Ahrens, *Gannett Gains Reflect Rebound in Media Sector*, WASH. POST, Feb. 7, 2003, at E3 ("Gannett Co. yesterday reported revenue and profit increases for both the fourth quarter and all of 2002 . . . . *Gannett attributed the gains to a surfeit of political advertising at its television stations* . . . ." (emphasis added)).

24. *Post Revenue Rises in Fourth Quarter*, FLA. TIMES-UNION, Jan. 25, 2003, at E1 ("Fourth-quarter revenue rose 14 percent at the [Washington Post Co.] TV broadcasting division to $100.0 million, *due primarily to $20.1 million in political advertising*." (emphasis added)).

25. Andrei Postelnicu, *Stocks See Only Limited Boost from Jobs Data*, FIN. TIMES (London), Feb. 8, 2003, at 20 ("Hearst-Argyle, a television station owner and management company, reported higher earnings for the fourth quarter *thanks to revenue from political advertising in the midterm elections*." (emphasis added)).

amount of free coverage they devote to candidates and political events. In 2000, the three networks offering nightly newscasts—ABC, CBS, and NBC—spent forty-three percent less time than in 1992 and twenty-eight percent less time than in 1988, the last incumbent-free contest, covering the presidential campaign.[26] Even this small amount of coverage allowed little time for candidates to communicate directly to the public. Communication by anchors or reporters accounted for seventy-four percent of this campaign coverage; only twelve percent involved candidates themselves speaking.[27] This reflects a historical trend toward limiting the amount of time news programs devote to candidate speech. The average length of a candidate sound bite on the network evening news declined from over forty-three seconds in 1968 to fewer than nine seconds in 1988.[28] In 2000, the average length of a candidate sound bite continued to decline to 7.8 seconds.[29] As a means of comparison, the length of time George W. Bush appeared on one episode of *The Late Show with David Letterman* in October 2000, thirteen minutes, exceeded the amount of speaking time he received from the three network nightly newscasts *combined* in the month of October.[30]

Furthermore, this minimal amount of news coverage focuses largely on the "horserace" aspects of the campaign—not on substantive issues. According to the Annenberg Public Policy Center, only about twenty-five percent of the stories aired by the network newscasts before either the primary or general election in 2000 included candidate-centered discourse; the balance of the stories focused on campaign strategy and the relative standing of the candidates vis-à-vis one another.[31] Local broadcast stations' coverage of the campaign was not any better. A study conducted by the Lear Center of the news coverage of local broadcast stations in 2000 found that twenty-four percent of the stories aired in the last thirty days before the general election were issue-based; strategy-focused stories accounted for most of the balance.[32]

Other types of campaign coverage, including the airing of debates and conventions, fared no better on broadcast television stations. The most recent

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26. Center for Media and Public Affairs, *How TV News Covered the General Election Campaign*, MEDIA MONITOR, Nov./Dec. 2000, *available at* http://209.238.249.38/Mediamon/mm111200.htm.

27. *Id.* The remaining fourteen percent of time involved communication by all other sources, including pundits, voters, and campaign staffers. *Id.*

28. Daniel C. Hallin, *Sound Bite News: Television Coverage of Elections, 1968-1988*, J. COMM., Spring 1992, at 5, 5-6.

29. Center for Media and Public Affairs, *supra* note 26.

30. *Id.*

31. ERIKA FALK & SEAN ADAY, ANNENBERG PUB. POLICY CTR., ARE VOLUNTARY STANDARDS WORKING?: CANDIDATE DISCOURSE ON NETWORK EVENING NEWS PROGRAMS 5 (2000), *available at* http://www.annenbergpublicpolicycenter.org/03_political_communication/freetime/2000-voluntary%20standards%20report.pdf.

32. MARTIN KAPLAN & MATTHEW HALE, NORMAN LEAR CTR., LOCAL TV COVERAGE OF THE 2000 GENERAL ELECTION 10 (2001), *available at* http://www.learcenter.org/pdf/campaignnews.pdf.

presidential campaign marked a watershed in broadcast television's coverage of debates. Instead of covering the third presidential debate between Al Gore and George W. Bush, NBC offered its stations the option of broadcasting a baseball playoff game and Fox ran a dramatic show.[33] Until that year, all the major networks always had carried the presidential debates in prime time.[34] Broadcast television stations also reduced their coverage of the national political conventions. In 1976, the three major networks offered over fifty hours of convention coverage; by 1996, that number dropped to twelve hours.[35] In 2000, the networks covered ten-and-a-half hours of the Democratic National Convention and about seven-and-a-half hours of the Republican National Convention.[36]

This overall decline in campaign coverage has created a troublesome dynamic. As broadcast television stations offer less free news coverage of elections, candidates become increasingly reliant on paid political advertising to reach the large audience accessible only through broadcast television stations. Thus, broadcast television stations reap the economic rewards of the large demand for advertising time created, in part, by the shirking of their public interest responsibilities to cover campaigns and provide voters with the information they need to make informed decisions within the democratic process.

D. *The Costs of Campaigns and Limits in Free Coverage Create Large Barriers to Entry for Challengers*

The increasing cost of political campaigns and the decreasing ability of candidates to communicate their messages through free media combine to create a huge barrier of entry for challengers.[37] Without sufficient resources, a challenger possesses few means for communicating with voters—to make voters aware of her existence and her ideas—and thus cannot hope to compete effectively against incumbents who face little difficulty communicating with voters because they inevitably can access sizable amounts of resources to pay for their advertising. This resource-access disparity, which largely dictates the varying abilities of candidates to advertise, often deters quality challengers

33. *Political Almanac*, SEATTLE POST-INTELLIGENCER, Oct. 19, 2000, at A18.

34. John McCaslin, *Inside the Beltway*, WASH. TIMES, June 14, 2002, at A6.

35. THOMAS PATTERSON, JOAN SHORENSTEIN CTR. PRESS, POLITICS, & PUBLIC POL'Y, IS THERE A FUTURE FOR ON-THE-AIR TELEVISED CONVENTIONS? 1 (2000), *available at* http://www.ksg.harvard.edu/presspol/Research_Publications/Reports/conventioncoverage.pdf.

36. Tim Cuprisin, *Democrats Got More TV Time than GOP*, MILWAUKEE J. SENTINEL, Aug. 22, 2000, at 6B.

37. *See Free Speech and Campaign Finance Reform: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 39 (1997) (statement of Rep. Richard Gephardt); Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1100 (1996) ("The cost of television advertising makes fundraising an enormous entry barrier for candidates seeking public office . . . .").

from entering a race.[38]

As a result, those who can afford to self-finance their campaigns are increasingly the only individuals who mount effective challenges to incumbents. The amount of self-financed money spent by Senate candidates rose from five percent in 1988 to eleven percent in 1998.[39] This increase cannot be attributed to the spending of a few wealthy candidates—many more candidates are financing large portions, if not all, of their campaigns. In 1998, eighteen Senate candidates and sixty-nine House candidates contributed at least $100,000 to their campaigns.[40] Furthermore, self-financing occurs almost exclusively when an individual is challenging an incumbent or running for an open seat. In elections from 1988 to 1998, congressional incumbents raised only 1.6 percent of their campaigns funds through self-financing.[41] Although one Senate and two House incumbents contributed at least $100,000 to their campaigns in 1998, challengers and open-seat candidates for House and Senate seats raised twenty-three percent and seventeen percent, respectively, of their funds through self-financing.[42] The fact that, once in office, even wealthy challengers encounter no trouble in raising money from outside sources indicates the strong relationship between incumbency and access to funds.[43]

Consequently, the current system inhibits competition in federal elections, particularly by non-wealthy candidates. The need for money to buy television advertising, created in part by the severe reduction in television stations' news coverage of candidates and campaigns, fuels the dramatically rising cost of campaigns, which in turn necessitates ever increasing fundraising efforts. Incumbents typically possess a massive fundraising advantage over any challengers, which often deters people from even entering a campaign. Even when there is no incumbent in the race, the ability of "millionaire" candidates to fund their campaigns makes it difficult for non-wealthy candidates to get their voices heard. As a result, the realities of today's elections, shaped by the demands of televised political advertising, must be addressed in order to increase the dissemination of information voters require to make decisions in campaigns and reintroduce meaningful competition into races.

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38. *See, e.g.*, Janet M. Box-Steffensmeier, *A Dynamic Analysis of the Role of War Chests in Campaign Strategy*, 40 AM. J. POL. SCI. 352 (1996).

39. COMM. FOR ECON. DEV., *supra* note 6, at 18.

40. *Id.*

41. *Id.*

42. *Id.* at 18-19.

43. The greater ease that incumbents enjoy in raising money stems from a number of sources: their ability to favor or disfavor donors, their high level of name recognition, their continuous contact with constituents over their terms, the service they provide their constituents, and their generally greater likelihood of winning. *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 19, 38, 156-58 (2002); *see also* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1134-36 (1994).

III. THE PAST: PREVIOUS FREE AIR TIME PROPOSALS

A. *The Evolution of Free Air Time Proposals*

Over the years, elected officials, regulators, and other interested parties have offered a range of free or reduced-price air time proposals to address the problems described above. In 1966, FCC Chairman E. William Henry suggested the first explicit proposal for free air time. Under his plan, a station that sold any time to a candidate would have to distribute an equivalent amount of free time among all the major candidates in the race. For example, if it were a two candidate race and one candidate bought one hour from a particular station, then the station would have to equally distribute an hour of free air time between the competitors in the race by giving one half-hour to the original candidate and one half-hour to his opponent. Foreshadowing much of the current debate over free air time, Henry's suggestion encountered widespread opposition and was never implemented.[44]

Over twenty years later, in 1987, two congressmen introduced separate bills which would have provided for different versions of free air time. Representative Samuel Stratton's proposal would have offered all presidential and congressional candidates free air time in the thirty days before a general election. His bill required that seventy-five percent of the free time come during prime-time viewing hours.[45] Representative Andrew Jacobs proposed a bill that would have granted public financing of broadcast and newspaper advertising to candidates who did not accept money from political action committees. Neither of these bills made it out of committee.[46]

The next year, Senator Mitch McConnell, ironically one of the most committed opponents to the McCain-Feingold campaign finance reform legislation, proposed discounted (but not free) time for candidates as well as requirements that candidates have the option to buy nonpreemptible time. His bill died in committee.[47] Also in 1988, then-Senator Al Gore, Jr. offered his own free air time legislation, which directed the FCC chairman to issue rules requiring all television and radio broadcasters each to provide six-and-one-half hours of free time to the Democratic and Republican presidential candidates during the eight weeks before an election. The bill died in committee.[48]

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44. *See* Glenda C. Williams, *Pleading the Fifth: Media Economics, Free Air Time, and the Fifth Amendment*, 6 COMM. L. & POL'Y 319, 321-322 (2001).

45. *Id.* at 322.

46. *Id.*

47. S. 2627, 100th Cong. (1988), *cited in* Williams, *supra* note 44, at 322.

48. S. 2923, 100th Cong. (1988), *cited in* Williams, *supra* note 44, at 322. Notably, in 1968, Senator Gore's father had said, "The public owns the airwaves which we give the television and radio stations permission to use, and . . . we could reserve a certain percentage of time for civic purposes." Hundt, *supra* note 37, at 1105.

Two years later, in 1990, Senator William Roth introduced a free air time measure that would have compelled the FCC to implement free air time policies for candidates for the presidency, Senate, and House of Representatives. His proposal contained some significant restrictions—it required candidates to forgo the purchase of any additional advertising during the forty-five-day period in which they received free air time and to agree "to limit the use of the television broadcast time provided to the personal presentation of his or her views in speeches, interviews, debates or similar formats." The bill died at the close of the session.[49] In 1991, Congress passed a bill[50] which provided free air time vouchers, and the ability to purchase non-preemptible time,[51] to Senate candidates.[52] The money from those vouchers was limited to funds received through a voluntary check-off system.[53] Nonetheless, the bill was vetoed by President Bush, and Congress did not have the votes to override it.[54]

In 1997, the Clinton Administration first confronted the issue of free air time when President Bill Clinton convened an advisory panel—the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (known as the Gore Commission)—to examine what public interest obligations, if any, should be imposed on broadcasters in exchange for giving them valuable spectrum space for free.[55] The final report recommended that instead of being required to provide free air time as part of their public interest obligations, broadcast stations should voluntarily air five minutes of candidate-centered discourse per night for the thirty days before an election (the 5/30 standard).[56] Broadcast stations largely failed to comply with the voluntary standards.[57] Returning to the issue in his 1998 State of the Union Address, President Clinton declared that he would call on the FCC to provide candidates with free air time.[58] When then-FCC Chairman William Kennard

49. S. 2964, 101st Cong. (1990).

50. Senate Election Ethics Act of 1991, S. 3, 102d Cong. (1991). The bill as passed contained the amendments described in *infra* notes 51-53.

51. S. Amend. 271 to S. 3, 102d Cong. (1991).

52. S. Amend. 242 to S. 3, 102d Cong. (1991)

53. S. Amend. 263 to S. 3, 102d Cong. (1991). A voluntary check-off system allows a taxpayer to indicate on his income tax return that he wishes to divert a pre-set amount of the taxes he owes to a fund which provides resources for a particular purpose. For instance, taxpayers currently can check-off a box on their income tax return that diverts $3 of their tax liability to the Presidential Election Campaign Fund, which pays for the existing matching funds system for presidential elections. *See* 26 U.S.C. § 6096 (2000).

54. Williams, *supra* note 44, at 323.

55. Exec. Order No. 13,038, 62 Fed. Reg. 12,065 (Mar. 11, 1997).

56. PRESIDENTIAL ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCAST FUTURE 59 (1998), *available at* http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf.

57. *See infra* Subsection III.C.4.

58. Address Before a Joint Session of the Congress on the State of the Union, 34 WEEKLY COMP. PRES. DOC. 129, 136 (Jan. 27, 1998) ("[W]e have to address the real reason for the explosion in

said he intended to move forward on President Clinton's call to action, members of Congress and broadcasters heavily attacked him. In the face of threats from Congress that they would cut the FCC's budget if he continued to pursue the issue, Kennard eventually dropped proposed rulemaking on free air time.[59]

Over the years that followed, Senators McCain and Feingold continued the fight for free air time for political candidates. Their Bipartisan Campaign Reform Act (better known as McCain-Feingold) originally contained a proposal addressing the spiraling costs of television in presidential campaigns, but they removed this provision because they felt its inclusion threatened final passage of the Act.[60] Recently, they joined with Senator Durbin to propose the Political Campaign Broadcast Activity Improvements Act.[61] The legislation contains a number of meritorious, if not entirely ideal, features, including the following three important provisions:

- First, the proposed Act would create a voucher program for federal candidates to acquire air time on broadcast or radio stations.[62] The Act sets the total cost of the voucher program at $750 million for the 2004 election, which is indexed to increase at the pace of inflation in subsequent election years.[63] In order to fund the program, a spectrum use fee of not less than 0.5% and not more than 1% would be assessed on the gross annual revenues of all spectrum license holders.[64] To qualify for the vouchers, candidates would be required to meet fundraising goals based on the office they seek through small donations.[65] If candidates qualified, the value of the vouchers

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campaign costs: the high cost of media advertising.... I will formally request that the Federal Communications Commission act to provide free or reduced-cost television time for candidates who observe spending limits voluntarily. The airwaves are a public trust, and broadcasters also have to help us in this effort to strengthen our democracy.").

59. *See* Charles Lewis, *Media Money*, COLUM. JOURNALISM REV., Sept.-Oct. 2000, at 20, 20; *see also* Kathy Chen, *Issue of TV Air Time for Public Affairs Is Raised Anew*, WALL ST. J., Dec. 15, 1999, at B4.

60. Williams, *supra* note 44, at 326-27.

61. S. 3124 , 107th Cong. (2002). The sponsoring senators developed this bill in close consultation with Paul Taylor and Norman Ornstein, two of the nation's leading advocates of free air time. The PCBAIA failed to make it out of committee in the 107th Congress, but the senators reintroduced it in the 108th Congress with a new title, the "Our Democracy, Our Airwaves Act of 2003." S. 1497, 108th Cong. (2003).

62. *Id.* sec. 4(a).

63. *Id.* sec 4(a), § 315A(d)-(e).

64. *Id.* sec. 4(a), § 315A(h)(2). Some commentators have suggested that *all* of broadcast stations' public interest obligations should be replaced by a flat five percent spectrum fee, but this is an ill-advised proposal. *See infra* note 180.

65. In order to be eligible to receive money from under this legislation, a candidate for the U.S. House of Representatives must raise $25,000 in contributions of no more than $250 each from individuals. Any money over $250 donated by an individual will not count toward the qualifying total. Thus, if an individual donates $2,000, the maximum allowed under the Bipartisan Campaign Reform Act, only $250 of that donation will count towards the $25,000 necessary for a candidate to qualify for the vouchers. Furthermore, the candidate must face at least one opponent who has raised or spent a minimum of $25,000 on that campaign to qualify for voucher allocations. S. 3124 sec. 4(a),

that they would receive would be based on how much money they raised according the to Act's rules, subject to maximum limits.[66]

- Second, the Act would amend the lowest unit charge rules contained in the Communications Act of 1934. The lowest unit charge would remain in effect, but it would no longer be based on the price charged by a station for the same class and amount of time for the same period during the forty-five days preceding a primary election and the sixty days preceding the date of a general or special election. Instead, it would be based on the lowest unit charge the station had given to any advertisers for the same class and amount of time during the 120 days before the use by the candidate or party. Furthermore, the proposal would prohibit stations from preempting the advertisements purchased by candidates, even if they bought "preemptible"-priced air time, except in circumstances beyond a station's control.[67]
- Third, the Act would require that television and radio broadcast stations air at least two hours of candidate-centered or issue-centered programming each week during the six weeks preceding a federal election. No less than one of those hours each week must occur between the hours of 5:00 p.m. and 11:35 p.m. (local time).[68]

These proposals—coming from presidents, senators, congressmen, and agency officials—are each valuable for advancing our thinking about free air time issues. However, each also contains flaws that would undermine its effectiveness. The following two Sections outline the strengths and weaknesses contained in various proposals; the subsequent Part draws upon these lessons to formulate a superior approach to free air time.

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§ 315A(b)(2)(C). For a candidate for the U.S. Senate to qualify, he must raise $25,000 from individuals, not including any money beyond $250 received from any single individual, multiplied by the number of U.S. representatives in the state in which the Senate candidate seeks election. For instance, a Senate candidate in Maryland, which has eight U.S. representatives, must raise $200,000 to qualify for Trust Fund money. Moreover, the candidate must face at least one opponent who has raised or spent a minimum of $25,000 on that campaign, multiplied by the number of U.S. representatives from that state. *Id.* sec 4(a), § 315A(b)(2)(D). Presidential candidates will qualify for voucher money in the same manner in which they qualify to receive partial public financing for their primary election campaigns and full public financing for their general election campaigns. *Id.* sec 4(a), § 315A(b)(2)(E). Under this legislation, national political parties can also qualify for a certain amount of free air time. *Id.* sec. 4(a), § 315A(c).

66. Upon qualification, House and Senate candidates will receive $3 from the Trust Fund for every $1 they receive as contributions from individuals, not including any money beyond $250 received from any individual. *Id.* sec. 4(a), § 315A(d)(2)(A). House candidates' allotment from the general-use portion of the Trust Fund cannot exceed $375,000 for the cycle; Senate candidates' take cannot exceed $375,000 multiplied by the number of U.S. representatives in the state in which they seek election. *Id.* sec. 4(a), § 315A(d)(2)(B). In a primary campaign, presidential candidates will receive $1 from the general-use portion of the Trust Fund for every $1 they receive in federal matching funds; in a general election campaign, presidential candidates will receive fifty cents for every $1 they receive in federal matching funds. *Id.* sec. 4(a), § 315A(d)(2)(C).

67. *Id.* § 2(a)(2), (d).

68. *Id.* § 3.

B. *Strengths of Past Proposals*

The goal of all free air time proposals is to reduce the role of money in elections and allow candidates with less resources than either incumbents or those that can self-finance their campaigns to compete more effectively. An effective way of accomplishing these goals, which some of the previously offered plans adopt, is providing qualifying federal candidates with a certain minimum amount (or "floor") of resources that they can use in their campaigns. The best of these plans also recognize that providing candidates resources is not sufficient to guarantee their usefulness. Instead, an effective free air time plan also requires addressing the fundamental flaws in existing laws that are intended but fail to secure candidates' ability to purchase low-cost advertising on broadcast stations.

1. *Creating a Floor of Resources to Increase Competitiveness of Elections*

One strength of some of the proposals, including the Political Campaign Broadcast Activity Improvements Act, involves their provision of a "floor" of resources to candidates. Some critics may dismiss the impact of such free air time proposals because self-financed candidates or those able to raise large amounts of money, such as incumbents, could opt out of the system and buy as many advertisements as they desired. Alternatively, critics may posit that, under these proposals, well-financed candidates could buy additional advertisements beyond those bought with their subsidies. Underlying both criticisms is the concern that, even under a free air time proposal that guaranteed all federal candidates certain resources, access to money would continue to determine the extent of a candidate's ability to communicate with the public.[69] However, research demonstrates that in order to be competitive, challengers need not match their opponents dollar for dollar. Instead, if candidates meet a certain threshold of spending, even if it is significantly less than the amounts spent by their opponents, they can be competitive.[70] Thus, "the most important variable in determining whether a race will be competitive is not how much money the better financed candidate spends, but how much money the less well financed candidate spends."[71]

Both historical trends and recent campaigns indicate the efficacy of creating a "floor" of resources for challengers in order to make them competitive. A study published in the *Brookings Review* of the 1540 races for the U.S. House of Representatives from 1976 to 1990 in which an incumbent faced a

69. TAYLOR & ORNSTEIN, *supra* note 8, at 17.
70. COMM. FOR ECON. DEV., *supra* note 6, at 17-18.
71. TAYLOR & ORNSTEIN, *supra* note 8, at 17.

challenger from a major party found that although money is a key factor in determining competitiveness, challengers need not spend as much as incumbents to win. In fact, this study indicated that over half of the victorious challengers spent less than the vanquished incumbent.[72] Recent campaigns also bear this out: Seven of the nine challengers who defeated House or Senate incumbents in 1998 spent less than their opponents,[73] including both Charles Schumer[74] and John Edwards.[75] In 2000, multiple challengers defeated incumbents who spent more than they did, including Debbie Stabenow[76] and Thomas Carper.[77] In 2002, numerous challengers also defeated better funded incumbents, including Mark Pryor[78] and Jim Talent.[79]

Although challengers clearly can be competitive without matching incumbents' spending dollar for dollar, recent trends, particularly in House elections, indicate that most challengers are unable to raise the necessary money—approximately $300,000 in House races—to reach the competitiveness threshold.[80] In 1998, almost one-half of challengers in House races raised under $100,000, and only approximately one-third raised $200,000.[81] In 2000, the median amount raised by Democratic House challengers was $70,079, and the median amount raised by Republican House challengers was $36,085.[82] Consequently, despite the relatively small amount of resources necessary for a challenger to make a race competitive, the vast majority of House races

72. Jonathan S. Krasno & Donald Philip Green, *Stopping the Buck Here: The Case for Campaign Spending Limits*, 11 BROOKINGS REV. 16, 18 (1993).

73. COMM. FOR ECON. DEV., *supra* note 6, at 17.

74. Alfonse D'Amato spent $27.2 million and Schumer spent $16.7 million. Fed. Election Comm'n, Financial Activity of 1997-98 Senate Campaigns, New York, *at* http://www.fec.gov/1996/states/nysen6.htm (last visited Mar. 22, 2004).

75. Lauch Faircloth spent $11.7 million and Edwards spent $8.3 million. Fed. Election Comm'n, Financial Activity of 1997-98 Senate Campaigns, North Carolina, *at* http://www.fec.gov/1996/states/ncsen6.htm (last visited Mar. 22, 2004).

76. Spencer Abraham spent $14.4 million and Stabenow spent $8.1 million. Fed. Election Comm'n, Financial Activity of 1999-2000 Senate Campaigns, Michigan, *at* http://www.fec.gov/2000/misen6.htm (last visited Mar. 22, 2004).

77. William Roth spent $4.4 million and Carper spent $2.5 million. Fed. Election Comm'n, Financial Activity of 1999-2000 Senate Campaigns, Delaware, *at* http://www.fec.gov/2000/desen6.htm (last visited Mar. 22, 2004).

78. Tim Hutchinson spent $2.1 million and Pryor spent $1.5 million. Fed. Election Comm'n, 2001-2002 Top 50 Senate Campaigns by Disbursements, *at* http://www.fec.gov/press/press2002/20020909canstats/t50_18m_s_disb.html (last visited Mar. 22, 2004).

79. Jean Carnahan spent $2.97 million and Jim Talent spent $1.7 million. *Id.*

80. COMM. FOR ECON. DEV., *supra* note 6, at 18 ("To move well into the competitive range . . . challengers typically need roughly $300,000 or more in resources.") The Committee for Economic Development determined this figure by calculating the relationship between the campaign spending of challengers and their percentage of the two-party vote in the 1998 congressional elections. *Id.*

81. *Id.* at 117.

82. Fed. Election Comm'n, Median Activity of House General Election Candidates, *at* http://www.fec.gov/press/051501congfinact/tables/housemedact.html (last visited Mar. 22, 2004).

remained uncompetitive.[83]

Thus, a free air time proposal that provides all qualifying challengers with a "floor" of resources would increase the competitiveness of federal elections.[84] If such a plan existed, neither incumbents' inherent fundraising advantages nor the possibility of facing "millionaire" candidates would serve as strong deterrents to non-wealthy challengers entering a race; rather, such challengers would be confident that they will have enough money to make voters aware of their candidacy, their positions, and their ideas.[85] In addition, by providing all qualifying candidates with a minimum amount of resources, a free air time proposal also hopefully would decrease the amount of fundraising engaged in by candidates, enabling them to spend more time directly serving the public.[86]

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83. COMM. FOR ECON. DEV., *supra* note 6, at 18. While redistricting played a role in the lack of competitiveness in the 2002 House elections, this factor does not account for the results of pre-2002 elections, which occurred before the institution of the new congressional district maps. As compared to past years, the 2002 redistricting process was particularly notable for its incumbent-protectionist nature. *See, e.g.*, Juliet Eilperin, *House Democrats' Climb Gets Steeper: Party Lacks Rallying Cry as Redistricting, Incumbency Cut Competitive Races*, WASH. POST, Apr. 2, 2002, at A1 ("A decade ago, there were roughly 100 competitive races following redistricting; this year there will be 30 to 40, perhaps even fewer . . . ."); Alison Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 13, 2002, at A20 ("With Congressional redistricting almost complete, the once-a-decade redrawing of the nation's political map is turning out to favor incumbents to an unusual degree, making many of the House's swing seats into safer territory for one party or the other."). This development can be attributed to many factors, including the political parties' more "brazen" pursuit of incumbent entrenchment and the use of new technology that has significantly facilitated their ability to reduce competition through gerrymandering. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002). The post-2002 increase in the number of seats that are "safe" for a particular party makes it even more critical to increase the competitiveness of races in those remaining "swing" districts that are not dominated by one party or the other, which (like the pre-2002 races) will otherwise remain largely uncompetitive due to the resource-access disparities discussed in this Note.

84. Some may suggest that even with a "floor" of resources, a candidate who relies exclusively on that floor might still be prevented from mounting a viable campaign if she faces an opponent willing to spend tremendous amounts of money on the race. While a House candidate with a resource floor of $375,000 running against an opponent spending $1 million is probably better off then a similarly situated candidate running against an opponent spending $20 million, even a large resource disparity is not determinative in campaigns. If candidates are provided with a floor of resources, then they will be ensured that, no matter how much their opponents spend, they will have sufficient resources to make voters aware of their campaigns and the ideas they represent. Moreover, as discussed in *infra* Part V, nontraditional media can empower even candidates facing opponents with significantly more resources to run winning campaigns.

85. An educational campaign, possibility instituted by the Federal Election Commission (FEC), that teaches candidates about only needing a "floor"—and not a dollar-for-dollar match—to be competitive would also be a key element in the initial implementation stages of the Proposal. The FEC already offers numerous services—including an anonymous toll-free hotline and multiple annual conferences and roundtable discussions—to educate candidates, congressional staffers, lawyers, accountants, consultants, and political committee staff about campaign finance laws. *See* Fed. Election Comm'n, FEC Services: Help with the Campaign Finance Law, *at* http://www.fec.gov/pages/infosvc.htm (last visited Mar. 22, 2004). Education about the utility of a "floor" of resources, as part of a campaign to teach people about a new campaign subsidization measure such as the one proposed by this Note, could be incorporated into these existing FEC efforts. Furthermore, the agency could hold special sessions focused specifically upon the new measure immediately after it is first enacted, as has been suggest the FEC do with the recently enacted Bipartisan Campaign Reform Act. *See* Jennifer Yachnin, *House Admin Requests BCRA Symposium*, ROLL CALL, Oct. 20, 2003.

86. *See* Hundt, *supra* note 37, at 1105 ("Of course, even if access to electronic media were cheaper and easier, many candidates would still raise money for other legitimate campaign purposes. But if

In sum, providing a minimum floor of resources constitutes a necessary part of any good free air time proposal.

2. *Maximizing the Value of Candidates' Resources Through Reform of the Lowest Unit Charge Rule*

Some of the earlier free air time proposals recognize that an effective free air time proposal cannot only provide candidates resources; it must also maximize the value of those resources by addressing the primary flaws in the existing lowest unit charge framework. Under the current system, stations can set the lowest rate based on the demand for time on a particular day. Thus, as the demand for time increases in the last months of a campaign, the rate upon which the discount is based continues to get higher and higher.[87] Because political advertisers often must buy time close to the date when they want a commercial to air, as opposed to commercial advertisers who can often buy their advertising time further in advance, this dynamic particularly impacts candidates.[88] Furthermore, as discussed above, many commercial advertisers buy preemptible time, but the unique needs of candidates often requires them to buy non-preemptible time, for which stations charge a further premium.[89] This need for non-preemptible time, and uncertainty about how high the price of such time could reach, drives a candidate to engage in preemptive fundraising to ensure that she will have enough resources to afford advertising time throughout her entire campaign.

By requiring stations to base the lowest unit charge on the price that the station has given to any advertiser for the same class and amount of time during an extended period before the candidate's own use—such as the 120 days proposed by the Political Broadcast Campaign Activity Improvement Act[90]—

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candidates could be guaranteed access to a reasonable amount of air time, they could certainly cut back on their fundraising efforts and devote more time to the work for which the public hired them. I doubt there is an elected official who would not prefer such an outcome.").

87. *See supra* Section II.B. As an advertising salesman for NBC's New York affiliate stated, "Yes, we do raise the [lowest unit charge] for candidates from week to week if everyone else's rates are going up . . . . We're not supposed to lose money on campaigns, so if the demand is there, we raise the cost of doing business for everyone." ALLIANCE FOR BETTER CAMPAIGNS, *supra* note 19, *at* http://www.bettercampaigns.org/reports/display.php?PageID=40.

88. This distinctive need of candidates can be attributed to a variety of factors. Often candidates use advertisements to respond quickly to breaking news stories or advertisements run by opponents, and thus do not know whether they will want to run an advertisements until very soon before they need it to air. In addition, the dynamics of a race can change quickly—with some candidates dropping out and new candidates joining the race—which also makes it difficult for candidates to engage in much advance planning. Finally, the extent of candidates' advertisements purchases depends on how much money they possess. Because fundraising efforts are often contingent on performance (or poll numbers), candidates frequently do not know far ahead of time whether they will have the resources to run advertisements.

89. *See supra* Section II.B.

90. *See supra* note 67 and accompanying text. It is important to note that this 120-day period is only used to set the rate for the time; candidates will only be entitled to buy time at this rate for the sixty days before a general election and the forty-five days before a primary election, as provided in current

and by compelling them to treat as non-preemptible those candidate advertisements bought at the preemptible rate, a free air time proposal makes the *lowest* aspect of the lowest unit charge meaningful and thus maximizes the value of the resources granted to candidates through a free air time plan.[91] Consequently, these proposed reforms of existing law should be included in any free air time plan.

C. *Weaknesses of Past Proposals*

While many of the previously suggested free air time proposals include desirable aspects, they each also contain design defects that undermine their effectiveness. The primary weakness of these past proposals is their almost exclusive focus on providing candidates with free or reduced-price broadcast television time and thus their failure to give candidates the flexibility to use advertising subsidies in the matter they believe to be most efficacious. Many of the past proposals contain additional drawbacks, such as imposing content restrictions on candidates as a condition of their receiving free air time, requiring television stations to air specific types of campaign-related programming *in addition* to giving candidates free air time, and relying on voluntary commitments by broadcasters. The inclusion of such provisions in a free air time plan would be a mistake and should therefore be avoided.

1. *Lack of Flexibility*

All of the previously advanced proposals share a common fundamental flaw: They focus their attention almost exclusively on providing or subsidizing broadcast television air time. However, many federal candidates have different requirements because of the specific office for which they are running, the media market or markets in which their constituents reside, or other reasons. For these candidates, it may not make sense to run advertisements on broadcast television.[92] While broadcast television historically has played a predominant role in campaigns, other media—particularly the Internet and cable television—perform increasingly important functions. By limiting subsidies to broadcast television advertising, a free air time proposal may skew candidates' spending

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law.

91. Although these requirements will likely result in some financial losses to broadcasters, the losses are likely to be less drastic than some members of the broadcasting industry claim. According to an industry source, the losses "are likely to be limited to less than 10 percent, because increased demand is expected to result in higher prices for the limited commercial inventory remaining." Doug Halonen, *Cry Raised Against Cheap Political Spots*, ELECTRONIC MEDIA, Apr. 9, 2001, at 3.

92. As Taylor and Ornstein point out, this approach also does not make sense for television stations. In their discussion of a hypothetical system that gave all candidates a fixed number of ads, they note that television stations in large media markets, such as New York or Philadelphia, would face severe difficulties due to the fact that such broadcasters' coverage areas encompass many congressional districts. TAYLOR & ORNSTEIN, *supra* note 8, at 26 n.33.

decisions. Consequently, an effective free air time proposal must give candidates the flexibility to use the resources provided by the government on media other than broadcast stations.

2. *Content Restrictions on How Candidates Can Use Their Free Air Time*

Beyond restrictions on which media candidates can use their subsidies, some of the proposed plans would impose content restrictions on advertisements that are aired using the free air time, for example, requiring candidates to refrain from airing "attack ads."[93] Others would only offer free air time in certain forms, such as five-minute blocks, in order to promote a certain type of campaign discourse.[94] These measures fail to account for the reality that candidates compete not just against other candidates, but also against commercial advertisers and traditional entertainment to gain the attention of voters. As a result, it is essential that a free air time plan avoids placing undue burdens on candidates' ability to vie for attention in the marketplace of ideas.[95] Such restrictions impede candidates' capabilities to explore the limits of their imagination—an important feature as candidates increasingly take advantage of non-traditional media. While some might think that certain attack messages or other advertisements are undesirable,[96] it is best for the government to refrain from making content-based distinctions among different kinds of campaign

93. The primary reason for the government to avoid making such distinctions is that differentiating helpful from harmful campaign discourse is not always straightforward, creating the risk that government intrusion will do more harm than good. Widespread beliefs about what types of advertisements facilitate voters' ability to make informed decisions about candidates, held by officeholders, agency officials, candidates, commentators, and others, are largely false. Kathleen Hall Jamieson, one of the foremost scholars on political communication, explains that, despite popular assumptions, so-called "negative advertising" is frequently more useful than "positive advertising" in helping voters make informed decisions about how to vote. She explains that what many call "attack ads" (i.e., advertisements that focus on candidates' failings) often help voters to distinguish between candidates and make informed decisions about elections. KATHLEEN HALL JAMIESON, EVERYTHING YOU THINK YOU KNOW ABOUT POLITICS . . . AND WHY YOU'RE WRONG 103-106 (2000). In a study conducted of presidential advertisements from 1952-1996, Jamieson found that "attack ads" are more likely to contain relevant, substantive information about candidates' policy positions than advertisements that people typically regard as "positive" (i.e., "advocacy ads" or "issue ads"). *Id.* Thus, Jamieson's work indicates the danger in allowing the government to regulate the use of "attack ads" or other types of messages that are widely (but potentially falsely) thought to be harmful to campaign discourse—such efforts would actually inhibit the amount of useful information that voters receive.

94. *See, e.g.*, Jeffrey A. Levinson, Note, *An Informed Electorate: Requiring Broadcasters To Provide Free Airtime to Candidates for Public Office*, 72 B.U. L. REV. 143, 159-62 (1992).

95. *See* Hundt, *supra* note 37, at 1107-08 ("Candidates, like it or not, compete for attention against the most creative people in the world: those who invent broadcast television shows and ads. We must give candidates and their advisers the room to use their own ingenuity to attract an audience and to get their message across.").

96. This approach has been embraced by officeholders and commentators. For instance, Senator Dorgan—cosponsor of the Political Campaign Broadcasting Activity Improvements Act—stated, "Certainly the 30-second political attack ad does little, if anything, to inform the public about the issues and advance the debate." 144 CONG. REC. S1076 (daily ed. Feb. 26, 1998) (statement of Sen. Dorgan). Observers of elections have offered a similarly negative view of "attack ads." *See, e.g.*, Editorial, *Those Infernal Attack Ads*, BALT. SUN, Nov. 2, 1994, at 18A.

messages.

3. *Requiring Broadcast Stations To Air Certain Content in Addition to Free Air Time*

Another undesirable restriction included in some of the previously proposed plans is a requirement that broadcast stations air a certain amount of election- or candidate-centered programming for a designated period before an election in addition to giving candidates free air time.[97] Although these further restrictions on broadcast licensees could offer some value, their benefits do not outweigh their drawbacks. First, and most importantly, a successful solution to the information deficit and lack of competition in campaigns requires more *candidate-controlled* speech. However, broadcast stations' coverage of campaigns often provides little substantive information to voters, focusing instead on the "horserace" or strategic aspects of the campaign, giving short shrift to challengers, and favoring analysis from reporters and pundits over unfiltered communication from candidates.[98] It may be possible to formulate programming requirements that address concerns about the content of coverage; however, creating, implementing, and enforcing compliance with such rules would place a large administrative burden on the FCC, which would already be forced to increase its monitoring efforts of these stations if a free air time plan contained revised lowest unit charge rules. Moreover, any effective programming rules would involve excessive government entanglement in broadcast stations' programming decisions, which is potentially more constitutionally suspect than increased governmental involvement in reviewing advertising rates. As a result, because of concerns with their efficacy and the administrative difficulties they would entail, programming requirements should be avoided.

4. *Voluntary Measures*

In deciding what public interest obligations should be imposed on broadcasters in return for the federal government's giving them the valuable digital spectrum space at no charge, the Gore Commission ultimately recommended voluntary commitments by broadcasters to air five minutes of candidate-centered discourse per night for the thirty days before an election (the 5/30 standard). Broadcasters initially suggested they were amenable to these voluntary standards, but the low level of compliance with them indicates the problem with this approach. In the thirty nights before the 2000 general election, for example, *none* of the networks offered the recommended five

97. *See, e.g.*, Political Campaign Broadcasting Activity Improvement Act, S. 3124, 107th Cong. § 3 (2002); TAYLOR & ORNSTEIN, *supra* note 8, at 17.

98. *See supra* Section II.C.

minutes of candidate-centered discourse.[99] In fact, the average amount of time offered reached a mere 1.23 minutes.[100] Even when given $70 billion worth of spectrum space, local stations and networks still failed to meet a minimal voluntary standard. Thus, a free air time plan which relies on voluntary measures is destined to fail.

IV. THE PROPOSAL: A COMPREHENSIVE POLITICAL MEDIA SUBSIDIZATION AND REFORM PROPOSAL

A. *The Elements of the Proposal*

The Note's Proposal draws upon the best features of past plans—and avoids their pitfalls—while also taking into account the evolving media dynamics that shape modern campaigns. Although some of the past plans properly reflected an understanding that increased competitiveness can be achieved by providing all candidates with a certain minimum level of resources, most incorporated an outdated conception of the current media environment and thus severely limited their own potential effectiveness. As a result, one key element of the Proposal is the provision of a minimum floor of resources to all qualifying candidates that can be utilized on *any* type of advertising or promotional activity that they desire, whether on broadcast, cable, or satellite television, radio, the Internet, newspapers, magazines, direct mail, billboards, flyers, posters, or any other type of similar general communication media. By providing candidates the critical floor of resources found in previous proposals but allowing them to spend those resources on any form of advertising or promotional activity, the Proposal should maximize its usefulness to all federal candidates. It should function well whether applied to a House candidate in New York, who may believe that her resources are best spent on direct mail, a Senate candidate in New Jersey, who may want to rely primarily on radio and cable advertisements, or the Republican nominee for President, who may desire to focus her resources on broadcast television advertisements.

The Proposal includes another innovative element that differentiates it from previous plans: It provides candidates with resources specifically earmarked for Internet-based campaigning. The Internet's unique attributes are particularly conducive to increasing competitiveness and the quality and quantity of information exchanged in campaigns.[101] Because candidates have thus far failed to make widespread use of these nontraditional media, the provision of

99. FALK & ADAY, *supra* note 31 (describing the results of a study conducted by the Annenberg Public Policy Center).

100. KAPLAN & HALE, *supra* note 32, at 1 (describing the results of a study conducted by the Norman Lear Center).

101. *See infra* Part V.

the Internet-specific resources will encourage and shape candidates' uses of this important medium.[102]

In order to fund these subsidies, the Note's Proposal utilizes a modified version of the funding, qualification, and distribution systems found in previous proposals. To pay for its cost, a spectrum fee will be assessed on the gross annual revenues of all spectrum license holders. This fee will fund a "Campaign Media Trust Fund" from which the subsidies—the value of which will be set at $850 million for the 2004 election cycle—will be distributed.[103]

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102. Although the designation of funds for Internet-based activities represents a departure from the Proposal's animating principle of flexibility in subsidy use, the unique qualities of the Internet for campaign purposes, the fact that it remains vastly underutilized, and the potential for campaign subsidies to stimulate its utilization, as well as the fact that the Internet-specific funds are a supplement to the much larger provision of general-use resources, justify this departure. These funds will spur candidates who otherwise would not think to use the Internet to consider how they can leverage it in their campaigns. The Internet can be useful even for candidates seeking to represent constituencies which are largely unfamiliar with it. For instance, such a candidate can use the Internet to reach donors residing outside her district who would be interested in providing support but who would otherwise not have learned about the candidate or have been able to easily communicate with her. *See infra* Section V.A. In addition, the Internet can be used to connect with and motivate those few people within a district who do have access to the Internet to reach out to and mobilize, in the old-fashioned way, those who do not use the Internet. *See id.* Therefore, although earmarking certain supplemental resources for Internet-specific uses reduces campaigns' flexibility, the extent of this diminution is negligible. Under the Proposal, campaigns receive the bulk of the subsidies without any rules about the type of advertising or promotional activity for which the funds can be used. Furthermore, these restrictions are less onerous than they may at first appear, for the Internet can be useful even to those candidates campaigning in areas with low levels of Internet penetration.

103. This amount is $100 million more than that called for in the Political Broadcast Campaign Activity Improvements Act. This increase reflects the additional funds that the Proposal provides for Internet-specific subsidies and the desire to ensure that there are adequate funds for qualifying third-party candidates. The $850 million figure covers the cost of the Proposal based on the following calculations:

Each election year, elections are held for the 435 seats in the House of Representatives. I estimate that in each of those elections, there will be an average of two and a half candidates who would qualify for funds under the Proposal. In many races, only the general election candidates from the two major parties would qualify; in others, a third-party candidate or a major party candidate in a primary would qualify; in yet other races, some of those candidates or other candidates would qualify for only a percentage of the maximum funds. Under the Proposal, each qualifying House candidate could receive a maximum of $375,000, plus $75,000 in Internet-designated funds. Based upon these figures, the cost per House race amounts to $1.125 million, so that the total cost of funding all 435 House races amounts to $489,375,000.

The funding that Senate candidates receive under the Proposal is based on the number of congressional districts that exist in their states. For instance, a Senate candidate with ten congressional districts in her state would be eligible to receive a maximum of $3.75 million, plus $750,000 in Internet-designated funds. In each election cycle, elections are held for a third of the 100 Senate seats. To determine the average number of congressional districts that the states with Senate races in any given election cycle will encompass, one can divided the total number of districts (435) by three, for a total of 145 districts. That figure can be multiplied by the cost per House race ($1.125 million) to determine the total maximum cost for funding the Senate races—$163,125,000.

The Proposal would allow presidential candidates to receive $1 for every $1 they raise in matching funds in the primary and $0.50 for every dollar they raise in matching funds in the general election, plus an additional $0.20 for every dollar they raise in primary or general election matching funds for Internet-specific expenditures. In the 2004 election, the estimated maximum of matching funds that primary candidates can receive is $18,600,000, and the estimated maximum for general election candidates is $74,400,000. *See* Fed. Election Comm'n, Presidential Election Campaign Fund, *at* http://www.fec.gov/press/bkgnd/fund.html (last visited Mar. 22, 2004). If one estimates that four

This cost will be indexed to increase at the pace of inflation in subsequent election years. For candidates to qualify to receive resources from the Trust Fund, they would be required to raise a certain limited amount of money in small donations. This provision compels a candidate to show her viability before she receive funds. In this way, the Proposal does not discriminate against candidates from minor political parties—a candidate from any political party, whether major or minor, can receive money if she demonstrates her viability—but it also ensures that funds will not be wasted through indiscriminate distribution to candidates who clearly lack sufficient support to be competitive. In addition, the amount of money candidates receive—both in unrestricted and Internet-specific funds—will be based on the small donation fundraising.[104] The emphasis that these qualification and funding mechanisms place on small donors should have a positive effect on fundraising practices.[105]

Although a primary goal of this Proposal is to encourage and incentivize candidates' use of nontraditional media, broadcast television will likely remain a key element of many candidates' advertising strategies, at least for the short

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candidates will participate in the matching funding system and receive the maximum in the primary, the cost under the Proposal would be $89,280,000, while the cost for the general election would be $104,160,000. These estimates are particularly generous, however, because in the 2004 election cycle, both of the likely major party nominees, as well as an additional contestant in the Democratic primary, completely opted out of the matching-funds system in the primary election.

Based on these calculations, the total cost of the Proposal for an election cycle in which a presidential campaign occurred would be $845,940,000 ($489,375,000 plus $163,125,000 plus $89,280,000 plus $104,160,000).

104. See *supra* note 66 for an explanation of the funding mechanism, which draws upon the PCBAIA model. In addition to the funds that would be provided under a PCBAIA-type system, all candidates would receive twenty cents for every $1 they receive either through fundraising (if a congressional candidate, not including donated amounts beyond $250 from any individual) or through public financing (if they are a presidential candidate) to be spent only on Internet-based campaign activities. These funds would not count against the cap on money that congressional candidates can receive from the general-use portion of the Trust Fund. For instance, a candidate for the U.S House of Representatives could receive the maximum $375,000 from the general-use portion of the Trust Fund plus money from the Internet-specific portion of the Trust Fund. Similarly, for presidential candidates, the use of either the general or the Internet-specific Trust Fund money would not count against the expenditure limits imposed by the publicly financed matching-funds system.

105. By setting the qualifying donation limit ($250) at a level well below the maximum permitted by campaign-finance laws for individual donations (currently $2,000), the Proposal should increase the importance of small donors. Under the current system, the transaction costs involved in raising money often make it economically inefficient for candidates to spend their time raising small donations. However, because small donations are the means through which candidates would qualify to receive Trust Fund resources, the Proposal should make it more worthwhile for candidates to solicit small donors. This emphasis on small donors should neutralize some of the traditional fundraising advantages of wealthy challengers, who can self-finance their campaigns, as well as incumbents. *See, e.g.*, Jonathan S. Cohn, *Money Talks, Reform Walks*, AM. PROSPECT, Fall 1993, at 66 (discussing how campaign finance rules that permit large donations favor incumbents, noting that "[i]ncumbents are the ones with the ties to fundraising masterminds, and incumbents are the ones who receive the vast majority of money from special interests"). Howard Dean's campaign demonstrated that a reliance primarily on small donors can make a non-wealthy, non-incumbent candidate financially competitive with wealthy or established candidates. *See, e.g.*, Susan Page, *While Losing, Dean Has Transformed Race, Politics*, USA TODAY, Feb. 9, 2004, at 1A.

term.[106] As a result, it is essential that a free air time plan address the failure of current campaign laws designed to guarantee candidates low-cost access to the airwaves. In order to address these deficiencies, the Proposal retains the lowest unit charge but sets it by a new standard, extending the period on which it is based from the forty-five or sixty days immediately preceding a primary or general election to the *365 days* before the use by a candidate or party. Furthermore, the Proposal prohibits stations from preempting the advertisements purchased by candidates, even if they buy "preemptible" air time, except in circumstances beyond a station's control.[107] By implementing these two changes, the Proposal eliminates two loopholes that have eviscerated the protection that the lowest unit charge rules are intended to provide.

Moreover, in order to encourage candidates to use other forms of television, such as cable, which can be more cost-effective means of communicating with voters, the Proposal also amends existing campaign laws that currently apply only to broadcast stations to include cable stations as well. First, it extends the lowest unit charge requirement, based on the revised standard, to cable systems.[108] Second, it applies the reasonable access rules for broadcast stations to cable television providers,[109] requiring them to offer air time to federal candidates who can afford it and thereby providing a meaningful guarantee of the lowest unit charge requirement.

While previously proposed reforms had merit and advanced the thinking on this subject, the Proposal outlined in this Note best addresses the problems endemic in modern campaigns by providing all qualifying candidates with a floor of resources, granting candidates additional funds to be used on Internet-based campaigning, and reforming existing campaign laws to maximize the value of the resources provided. In doing so, the Proposal will reintroduce competitiveness into elections, facilitate the flow of information needed by voters to make decisions within the democratic process, and advance the use of new media that are particularly well suited to achieve the first two goals. While any measure to reform campaign practices faces an uphill battle—after all, incumbents in Congress typically are reluctant to change policies that run to

106. As Ron Brownstein, a prominent political columnist, wrote, "The Internet probably won't replace television anytime soon as the dominant way campaigns communicate with voters. But its use is steadily growing." Ron Brownstein, *Liberal Group Flexes Online Muscle in Its Very Own Primary*, L.A. TIMES, June 23, 2003, at 9.

107. The changes to the lowest unit charge rules resemble the changes found in the Political Campaign Broadcast Activity Improvement Act, S. 3124, 107th Cong. (2002), except it extends the period on which stations must base the lowest unit charge rate from 120 to 365 days. In this respect, the Proposal draws on the Torricelli Amendment to the McCain-Feingold campaign finance bill, S. Amend. 122 to S. 27, 107th Cong. (2001). As campaigns become longer, it is critical that the period on which the lowest unit charge is set also expands.

108. Currently cable systems are only required to offer candidates the lowest unit charge once they allow any candidate for a particular office to advertise. Cablecasting, 47 C.F.R. §§ 76.205-.206 (2003). However, they are under no obligation to provide reasonable access to political candidates. *Id.* § 76.205.

109. 47 U.S.C. § 312(a)(7) (2000).

their advantage—the successful enactment of the McCain-Feingold campaign finance reform measure demonstrates that such change is possible; it may just require many years of discussion and struggle. This ambitious Proposal is intended to highlight not only the best features of earlier proposals, but also some crucial areas that these proposals have overlooked, in the hopes of spurring this necessary future debate and informing future policy initiatives.

B. *Broadcasters' Arguments Against Such a Proposal Are Unpersuasive*

Because the Proposal will be funded through a spectrum fee and many of its provisions will impact broadcasters, it is important to consider broadcasters' arguments—all of which are entirely unpersuasive—against free air time proposals.

First, broadcasters assert that the financial burdens imposed by free air time proposals are too great.[110] However, as a result of government policies, broadcasters have reaped significant financial gains. In 2001, one Wall Street analyst estimated, based on recent auctions of other parts of the spectrum, that the value of the free spectrum licenses granted to broadcasters is as high as $367 billion, a figure that exceeds the stock market value of all U.S. broadcast stations combined.[111] Although the broadcasters ostensibly must return their analog spectrum licenses to the government in exchange for this digital spectrum space on December 31, 2006,[112] the law contains a loophole that makes such a return exceedingly unlikely.[113] The broadcasters also receive other government-created economic benefits at no charge, including the "must carry" rules for cable operators and additional spectrum space for digital television.[114] Therefore, government policies essentially create billions of

110. *See, e.g., Campaign Finance Reform: Proposals Impacting Broadcasters, Cable Operators, and Satellite Providers: Hearing Before the House Subcomm. on Telecomm. and the Internet*, 107th Cong. 18 (2001) (statement of Jack Sander, Executive Vice President Media Operations, Belo Corp.) (claiming that one aspect of some free air time proposals—revising the lowest unit charge rules—would "severely injur[e] a television station's ability to raise revenue"); Amy Keller, *More Reform Battles Ahead*, ROLL CALL, Mar. 25, 2002 (describing how the National Association of Broadcasters argued to Congress that revisions of the lowest unit charge rules "pose substantial financial burdens to the industry, and could even result in lay-offs of employees").

111. MICHAEL CALABRESE, BATTLE OVER THE AIRWAVES: PRINCIPLES FOR SPECTRUM POLICY REFORM 3 (New America Foundation, Spectrum Series Issue Brief No. 1, 2001) (citing Tom Wolzien, Speech Before the National Association of Broadcasters Future Summit (Apr. 2001)), *available at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File647_1.pdf.

112. 47 U.S.C. § 309(j)(14)(A) (2000).

113. An individual broadcast station (e.g., an NBC affiliate in Mississippi) does not have to return its analog licenses if one of the following conditions occurs: (1) one or more of the local stations affiliated with one of the four largest broadcast networks is not broadcasting a digital television signal, *id.* § 309(j)(14)(B)(i); (2) digital-to-analog converter technology is not generally available in that market, *id.* § 309(j)(14)(B)(ii); or (3) digital television is not available to eighty-five percent or more of the viewers in that market, *id.* § 309(j)(14)(B)(iii), something that is unlikely to happen in most television markets for many years (if at all). *See* Walter S. Ciciora, *James Madison Would Be Disappointed*, COMM. ENGINEERING & DESIGN, Feb. 1, 2003, at 52.

114. TAYLOR & ORNSTEIN, *supra* note 8, at 7-8.

dollars of value for broadcasters, yet the Proposal only requires them to pay between 0.5% and 1% of their gross annual revenue in order to raise $850 million dollars. This amount cannot be characterized as a major financial burden.

Second, broadcasters claim that they already offer concessions to candidates at their own expense and thus that demanding any more of them would be unfair. They cite the discounted air time and "free air time" that they provide candidates as examples of their existing efforts.[115] However, as previously discussed, broadcasters' manipulation of current law has essentially eviscerated the existing lowest unit charge rules,[116] while at the same time broadcasters have continually reduced their news coverage and debate time.[117] Furthermore, the type of exposure that candidates gain through news coverage or through the airing of debates differs significantly from that gained through advertisements. As the Congressional Research Service notes, "only in [advertisements] does the candidate have full control over how his or her message is presented, and for that reason the spot ads have come to play the major role they do in our elections."[118] Moreover, broadcasters have demonstrated unwillingness to comply even with voluntary measures, such as the 5/30 standard, for improving their coverage of candidates and campaigns.[119] As Norman Ornstein, one of the co-chairs of the Gore Commission, recently stated, "If the [broadcast stations owners] are not going to do something that minimal, then it becomes clear that the voluntary aspect of this is just a joke."[120]

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115. This view is reflected in the recent comments of the general manager of the ABC affiliate in Manchester, New Hampshire . He stated, "In the last election, we had 14 free half-hours (of features on candidates), two live debates, and we asked all the candidates about the 10 biggest questions facing the state and edited their answers together for broadcast so people could see their opinions on the issues, not to mention their normal appearances on the newscasts. . . . We think we offer plenty of free air time." Dan Atkinson, *Sununu: Free Ads in Elections Wrong*, UNION LEADER (Manchester, N.H.), Mar. 3, 2004, at C7 (quoting Jeff Bartlett, general manager of New Hampshire's WMUR-TV.).

116. *See supra* Section II.B.

117. *See supra* Section II.C. Some broadcasters have attributed these reductions to the increased coverage of politics on cable. However, although candidates should be encouraged to make better use of cable television, which would enable them to develop targeted political advertisements, *see supra* Section V.B, the size of the audiences on the cable news networks does not begin to approach that of the nightly network newscasts. Even after years of ratings attrition, the nightly newscasts on ABC, CBS, and NBC have continued to average a combined audience of thirty million, while CNN and the Fox News Channel each average only about one million viewers during prime time, with these dropping significantly during other time periods. TAYLOR & ORNSTEIN, *supra* note 8, at 13. Furthermore, even if the total number of people relying on cable and the Internet for news information one day equals that of broadcast, the issue of cost remains—broadcast television is free while cable and Internet connection fees cost $40 or more per month. If broadcasters are allowed to justify their lack of political coverage by relying on the coverage provided by other media, then the United States will be left with "a 'subscription democracy' in which the only citizens who had a front row seat to their presidential campaign would be those who could pay a monthly fee for the privilege." *Id.* at 14.

118. CANTOR ET AL., *supra* note 2, at 24.

119. *See supra* Subsection III.C.4.

120. Telephone Interview with Norman Ornstein, Co-Chair, Gore Commission, and Resident

In sum, broadcasters' arguments about why they should not have to pay a spectrum fee to finance candidates' speech across media carry little weight. The burden of such a fee is small, their current efforts are minimal, and their refusal to comply with even trivial voluntary standard indicates the necessity of a government-mandated measure.

V. THE POLICY: THE UTILITY OF INCENTIVIZING THE USE OF NONTRADITIONAL MEDIA IN CAMPAIGNS

The key innovation of the Proposal is its dual focus on giving candidates the utmost flexibility to use government-granted resources on different types of media during political campaigns while also stimulating the use of underutilized media through various statutory and regulatory changes. In addition, the Proposal provides targeted subsidies to foster campaign activities specifically on the Internet, hence serving as a potential catalyst for the growth of the Internet as a key campaign tool. Voters are increasing turning to the Internet to gain information about campaigns,[121] yet most campaigns have remained skeptical about its value[122] or have failed to fully exploit its advantages. While some candidates—notably Jesse Ventura, John McCain, and Howard Dean—have used the Internet in innovative ways to exploit its power as a campaign tool,[123] too many others have only used the Internet to post policy papers or speeches on relatively static websites, vastly overlooking the sophisticated possibilities offered by current Internet technology.[124] In giving candidates resources specifically earmarked for Internet-based campaigning, the Proposal provides them—even those whose disinterest, distrust, or discomfort with new technology would otherwise lead them to shy away from spending money on this campaign medium—a strong financial incentive to

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Scholar, American Enterprise Institute (Apr. 7, 2003).

121. According to a study conducted by the Pew Internet & American Life Project, more American voters utilized the Internet to acquire campaign information during the 2002 midterm elections than during the previous midterm elections in 1998. This reflected not only growth in the size of the online population, but also an increase in the proportion of those using the Internet to access election-related news. The latter figure grew from fifteen percent in 1998 to twenty-two percent in 2002. PEW INTERNET & AM. LIFE PROJECT, MODEST INCREASE IN INTERNET USE FOR CAMPAIGN 2002, at 1 (2003), *available at* http://www.pewinternet.org/reports/pdfs/PRC_PIP_Election_2002.pdf.

122. *See, e.g.*, Ann M. Mack, *Politicians Log On*, MEDIAWEEK, Jan. 26, 2004 (suggesting the reason more campaigns have not utilized the Internet is that most of the people running campaigns are wedded to the old orthodoxy that television should be the primary campaign tool); Cliff Sloan, *Coming Soon to a Computer Near You: Gigabytes of Politicking*, L.A. TIMES, Dec. 29, 2003, at B11 (same); Mark Glaser, *Candidates Slow to Bring Political Advertising Dollars to the Web*, ONLINE JOURNALISM REV., Feb. 2, 2004 (same), *available at* http://www.ojr.org/ojr/glaser/1075699362.php.

123. *See, e.g.*, Frank Rich, *Napster Runs for President in '04*, N.Y. TIMES, Dec. 21, 2003, § 2, at 1 (discussing the Dean campaign's "breakthrough" use of the Internet, which was utilized not only to inform voters and to raise money, but also to "empower passionate supporters" to engage in grassroots political organizing).

124. *See, e.g.*, *id.* ("To say that competing campaigns don't get it is an understatement. . . . The other Democratic websites are very 2000, despite all their blogs and other gizmos.").

develop campaign strategies that incorporate the Internet; after all, by being offered Internet-specific funds, candidates will effectively lose resources that they would have received if they fail to do so.

The various mechanisms in the Proposal designed to stimulate the use of the Internet and other underutilized media, particularly cable television, are important due to their distinctive advantages over broadcast television and other types of media typically used in campaigns. These advantages—which render these underutilized media particularly promising for increasing the competitiveness and informativeness of campaigns—fall into four general categories: their relative *inexpensiveness*, their capacity to communicate more *individualized* messages, their potential to enable more *interactive* political dialog, and the *immediacy* with which they allow candidates to reach votes. In the following Sections, each of these advantages will be explored in turn.

A. *Inexpensiveness*

The low cost of utilizing the Internet or cable television offers a key advantage over the use of broadcast television: Because it is significantly cheaper to advertise, organize, or fundraise over either of these media than over broadcast television, candidates can engage in significantly more communication, organizing, and fundraising using less resources.

Cable allows candidates to employ television advertising without incurring the high costs of broadcast. The price per viewer to advertise on cable remains forty-five to sixty percent less than the price on broadcast television.[125] Despite this advantage, candidates thus far have largely failed to appreciate the many benefits offered by cable advertising,[126] with the portion of political advertising budgets spent on cable remaining below ten percent.[127] By giving candidates resources to spend on advertising and guaranteeing them affordable access to

125. Jon Lafayette, *All TV Networks Are Not Created Equal*, CABLE WORLD, Mar. 3, 2003, at 9. For the prized viewing demographic between 18 and 49 years old, it currently costs $21.10 to reach 1000 viewers during prime time on broadcast stations; it costs about half of that—$10.60—to accomplish the same on cable. *Id.*

126. Candidates do not buy cable advertising in significant amounts even in local races, despite the seemingly natural fit between such candidates' needs and cable's ability to deliver cheaper, more targeted messages. For example, the general election candidates in the 2001 New York mayoral race spent only five percent of their total $43 million in television advertising expenditures on cable. This led one cable company executive to complain that cable was not receiving its "rightful share" of political advertising, which he estimates should have amounted to twenty-two percent of television advertising outlays in that race. Christopher Schultz, *Stumping for a Fair Share of Political Advertising*, CABLE WORLD, Nov. 12, 2001, at 46. Part of the problem may be that cable television systems, in comparison to their broadcast competitors, have not done as good of a job of selling the advantages of their medium to candidates. As one cable executive stated, "The cable industry doesn't do a good job telling our story [to the political community]. They don't seem to realize that a percentage of every broadcast TV station dollar spent, say in New York, went to waste since [the buy] also covered New Jersey and Connecticut." Jim Forkan, *Political Looks Down for the Count*, MULTICHANNEL NEWS, Dec. 4, 2000, at 56.

127. TAYLOR & ORNSTEIN, *supra* note 8, at 22.

cable stations through the revised access and lowest unit charge rules,[128] the Proposal should raise the profile of cable television as a campaign medium. These statutory changes should especially appeal to those federal candidates running for House seats in major urban areas such as New York and Los Angeles, who often cannot afford to buy very much, if any, advertising time on broadcast stations.[129]

The Internet similarly offers significant cost-based advantages to candidates, enabling them to communicate with a much greater number of voters at far lower costs than could be achieved over other media.[130] In effect, as some political campaigns are beginning to understand, the Internet allows candidates to engage in essentially *unlimited* unfiltered communication with voters at little expense.[131]

Beyond advertising, the low cost of communicating via the Internet can also have a transformative effect on campaigns' ability to organize volunteers and mobilize supporters, enabling resource-disadvantaged campaigns to engage in these activities on a scale that would have been impossible otherwise. Jesse Ventura's campaign for governor of Minnesota constitutes one of those ground-breaking efforts. His use of the Internet to recruit and coordinate volunteers has been recognized as essential to his victory in that 1998 election.[132] Similarly, supporters of Howard Dean's presidential campaign pioneered the use of Meetup.com, a website that allows people of similar interests to connect with each other and set up in-person meetings at prearranged locations with little or no cost to the campaign.[133] Other campaigns and their supporters, following

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128. Cable systems are already required to offer *all* candidates for a particular office the lowest unit rate if they allow *any* candidate for that same office to buy advertising time. However, cable systems are not required to provide political candidates reasonable access in the first place, and thus, if they choose, can deny *all* candidates the ability to purchase available advertising time. *See supra* note 108.

129. Anthony Corrado, *The Public Interest and Digital Broadcasting: Options for Political Programming*, *in* COMMUNICATIONS & SOC'Y PROGRAM, ASPEN INSTIT., DIGITAL BROADCASTING AND THE PUBLIC INTEREST 293, 305 (Charles M. Firestone & Amy Korzick Garmer eds., 1998) ("[T]elevision and radio advertising does not play as great a role in House races, in part because almost one in six House districts is in a major urban area where television advertising may not be cost effective . . . ."), *available at* http://www.ciaonet.org/conf/asp06/asp06o.html.

130. Chris Schroeder, *Online Ads*, CAMPAIGNS AND ELECTIONS, Feb. 2004, at 38 ("In many campaigns, a point is reached where television simply can't be bought, because it's not available or it's too expensive. The Internet offers far greater flexibility and allows limited dollars to be spent more efficiently. In a recent . . . cross-media study, Colgate found that it costs 23 percent more to get the marketing results the company wanted when they used only television as opposed to television in combination with online advertising.").

131. *See* Ben While, *Electrons as Electors? Probably Not Yet*, WASH. POST, Apr. 16, 2000, at A10 ("Both [the Bush and Gore] campaigns stress the importance of . . . using the Web as a direct line to voters, allowing the presentation of 'unfiltered' issue information, schedules and video from TV ads and events on the campaign trail.").

132. *See, e.g.*, Greg Miller, *Web Helped the Decision Go To Jesse 'The Body' Ventura*, L.A. TIMES, Nov. 9, 1998, at C3 ("[L]ike most campaigns that used the Net effectively, Ventura depended on it less to get his message out than to mobilize and organize his backers.").

133. After seeing the success of the website as an organizing tool, the Dean campaign became a paying client of Meetup.com. The Dean campaign entered into "a bargain-rate contract with Meetup,

Dean's example, also began using Meetup.com.[134] The Dean campaign also utilized other social-network software that helped supporters organize independent Dean events and build support networks on their own via the Internet, without the supervision of the central office.[135] By encouraging such decentralized activity over the Internet and empowering supporters to act on their own, the campaign ensured that substantially more Dean events would occur than if the central office had relied exclusively on its own resources to organize supporters. Thus, the Ventura and Dean campaigns' use of the Internet demonstrate how its unique qualities can be exploited for political gain, empowering initially resource-poor candidates to build grassroots support networks and thus compete against initially better-funded, higher profile opponents.[136] By thus facilitating traditional campaigning and get-out-the-vote activities, the Internet served as a vital means for increasing the competitiveness of both races.

The inexpensiveness of the Internet also can dramatically improve a campaign's fundraising abilities. Direct mail operators typically charge between forty and fifty cents for every dollar that they raise and rarely manage to achieve a return rate above one percent (i.e., one donation for every one hundred letters mailed); telemarketers charge even more, up to seventy cents for every dollar raised, and have an equally dismal return rate.[137] Internet-based fundraising costs significantly less.[138] Moreover, unlike traditional, in-person fundraising, Internet fundraising does not require massive investments of candidate time and thus allows candidates to direct attention to other matters, like meeting with voters and discussing their campaign positions.[139] In addition,

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which allowed the campaign to sponsor its own events and to begin to compile what . . . [became] a list of more than a half million e-mail addresses." Mark Singer, *Running on Instinct*, NEW YORKER, Jan. 12, 2004, at 43.

134. By the week after the New Hampshire primary, more than 189,100 supporters had signed up on Meetup.com to attend a Dean meeting, more than 66,900 had signed up to attend a meeting for Wesley Clark, and over 39,000 had signed up to attend a meeting for John Kerry. Meetup.com, *at* http://www.meetup.com/browse/polact/cand/pres (last visited Feb. 6, 2004).

135. Samantha M. Shapiro, *The Dean Connection*, N.Y. TIMES, Dec. 7, 2003, § 6, at 56 (describing "Get Local," at Internet-based application used by the Dean campaign to help supporters get in touch with one another, plan gatherings, and download customizable campaign materials); Jake Thompson, *Internet Changes the Way Candidates, Voters Interact*, OMAHA WORLD HERALD, Jan. 17, 2004, at 6A.

136. Some have referred to such Internet-based grassroots networking as "netrooting." *See* Carla Marinucci, *Lesser-Known Candidates Getting Word Out on the Net*, S.F. CHRON., Apr. 5, 2003, at A3.

137. GRAEME BROWNING, ELECTRONIC DEMOCRACY: USING THE INTERNET TO TRANSFORM AMERICAN POLITICS 158 (2d ed. 2002).

138. *See, e.g.*, MICHAEL CORNFIELD & JONAH SIEGER, INST. FOR POL., DEMOCRACY, & THE INTERNET, THE NET AND THE NOMINATION 6 (2003) ("[I]n terms of 'cost per acquisition,' that is, the average number of pennies the campaign must spend to get a donor dollar, the Internet is the most efficient way to raise money."), *available at* http://www.ipdi.org/UploadedFiles/net_nomination.pdf; Bill Straub, *Online Political Fund-raising Soars*, SCRIPPS HOWARD NEWS SERVICE, Aug. 1, 2000, LEXIS, News & Business Library, Wire Service Stories File.

139. *See* Eve Gerber, *Six Arguments for Online Fund Raising*, SLATE, Jan. 19, 2000 ("E-fund-raising enables candidates to cut down on the time-consuming ballroom speeches and the humiliating spectacle of posing for pictures with wealthy donors."), *at* http://slate.msn.com/id/73270 (last visited

because of the low costs of Internet fundraising, campaigns can efficiently use it to raise low-dollar-value contributions. In contrast, the high cost of other fundraising mechanisms, such as direct mail, telemarketing, or in-person dinners, often make soliciting low-dollar-value contributions economically unfeasible. This feature of the Internet, combined with the requirement that candidates raise small contributions from many individual donors in order to qualify for Trust Fund subsidies, should encourage a refocus on smaller donors. Finally, fundraising over the physically boundless Internet also makes raising money from people located in places far away from the campaign and from each other cost effective. In contrast, relying on traditional (in-person) fundraising mechanisms to reach geographically dispersed potential donors residing in lower density areas would be entirely cost-prohibitive for most campaigns.

For precisely these reasons, the Dean presidential campaign relied on the Internet for much of its fundraising. As Dean's campaign manager stated, "[The Internet was] a major component of the campaign . . . particularly because how we started out with less money and less money connections than any of the other campaigns."[140] Based on its early, innovative, and aggressive use of the Internet, the Dean campaign raised the most money of any of the Democratic nominees for president and rejected federally offered matching funds because of the $45 million cap on spending that acceptance of such funds entails.[141] Even after suffering significant electoral setbacks, the Dean campaign continued to raise a steady stream of money over the Internet.[142]

In sum, providing candidates funds for use on cable television and the Internet furthers the goals of increasing the informativeness and competitiveness of modern campaigns. Because of the low cost of cable- and Internet-based campaigning, candidates can disseminate substantially more information using those media than if they relied on broadcast television, thus increasing the quantity of information in a campaign. Additionally, the inexpensiveness of the Internet greatly facilitates campaigns' organizational and fundraising efforts, thus increasing the ability of resource-poor campaigns to be competitive.

Mar. 22, 2004).

140. Tracy Schmaler, *Net Gain: Dean Gets Online Boost*, RUTLAND HERALD (Vt.), Apr. 19, 2003, at Front Page, *available at* http://rutlandherald.nybor.com/News/Story/64121.html. In one quarter, Dean raised $7 million online. Shapiro, *supra* note 135.

141. Francis X. Clines, *The Doctor and the Net: His Bloggers and Donors Pursue Victory via the Mouse*, N.Y. TIMES, Nov. 17, 2003, at A20.

142. Jodi Wilgoren & Adam Nagourney, *Dean Says He'll Quit if He Doesn't Win Wisconsin*, N.Y. TIMES, Feb. 6, 2004, at A1.

B. *Individualization*

Another key advantage of both the Internet and cable television is that they allow campaigns to target messages to particular individuals, providing voters with information that is more relevant to them and thus more valuable in helping them make informed decisions about candidates as compared to general, "broadcast" messages.

For many House (as well as some Senate) candidates, broadcast channels reach an audience that is too expansive—it covers many people who do not reside in their districts.[143] Cable, on the other hand, enables candidates to more precisely channel their messages to individuals within their voting districts—to be more "geoefficient," in the jargon of cable-television sales representatives.[144] This quality of cable television is not only important to a candidates who represents a district that is within a large media market or covers multiple media markets, but also to one seeking to direct a message to a particular set of voters within her broad constituency.[145] It may also prove appealing to Senate and presidential candidates who are seeking to maximize their resources or to better tailor messages to particular audiences.[146]

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143. *See, e.g.*, Billy Sternberg, *Should You Buy Cable Spots in Local Races?*, CAMPAIGNS & ELECTIONS, Oct. 2001, at 48 (noting that "[o]ne-third of NYC's broadcast signal reaches much of New Jersey, Connecticut and the counties up-state approaching Albany," meaning that many of the people viewing political advertisements aimed at New Yorkers are not New York voters). As an indicative example, consider the case of now-U.S. Senator Jon Corzine, who bought more time on New York City's local stations to win his New Jersey seat that did Hillary Clinton and Rick Lazio combined. After speculating that this caused confusion for voters in both New York and New Jersey, Sternberg observes that "unlike Clinton and Lazio, Corzine's campaign had to do the same thing in Philadelphia, too. *This is despite the fact that cable's distribution includes every one of Jersey's 21 counties.*" *Id.* (emphasis added).

144. *See* Jerry Hagstrom, *Ad Attack*, 24 NAT'L J. 810, 813 (1992) ("Cable TV sales representatives argue that cable is 'geoefficient' and that politicians can use it to inexpensively target their message to the most-receptive voters. Because they serve jurisdictions smaller than major metropolitan areas, cable operators say, it's now possible for politicians—especially House candidates—who have found television advertising too expensive to sell themselves on TV.").

145. Congressman Barney Frank's use of cable television to reach a particular community within his district illustrates that medium's advantages. After a round of redistricting, Frank found himself running against another incumbent in a district that including a city, Fall River, that had been represented by his opponent for sixteen years. Frank's chances of district-wide victory depended on winning a significant portion of the voters in Fall River, in which many Portuguese, senior citizens, veterans, and working people resided. Frank could have bought advertising time on the Boston or Providence broadcast networks to reach the people of Fall River, but doing so would have been very expensive and would not have allowed him to target a messages to those voters. Instead, he bought significantly cheaper time on the city's cable system and saturated it with programming and advertisements specifically designed to appeal to Fall River's various groups. His strategy was a resounding success—although he began the campaign as a two-to-one underdog in Fall River, he ended up winning there by that margin and winning the overall election. *See* RICHARD ARMSTRONG, THE NEXT HURRAH 165-73 (1988).

146. In addition to allowing targeting based on geography (by advertising on particular cable systems), cable also facilitates advertising based on demographics (by advertising on national cable networks). Different cable channels, such as Fox News, Lifetime, or MTV, tend to attract voters with different demographic characteristics. Candidates have recently begun to take advantage of this unique quality of cable networks. For instance, President George W. Bush's reelection campaign has targeted

Even more so than cable and other media typically used in campaigns, the Internet enables candidates to send targeted messages to potential voters with great precision.[147] This Internet-based message targeting often occurs via e-mail. By utilizing e-mail in tandem with a well-developed database—which can be built through a registration feature on campaign websites,[148] by requesting information from donors when they contribute online,[149] or by purchasing complied lists from other sources—campaigns can send targeted messages to specific audiences based on geographic location, demographic characteristics, issue concerns, or multiple other criteria.[150] E-mail can also serve as a means of staying in contact with supporters and keeping them aware of developments at times when the mass media is not paying much attention to a race in general or to an individual campaign in particular.[151] In addition, e-mail constitutes a particularly effective way for staying in contact with the media itself. A 2002 survey by the Pew Internet and American Life Project found that campaign professionals believed that communicating with the media was one of the best uses of the Internet.[152] The 2000 Senate race between Hillary Clinton and Rick Lazio offers an example of two campaigns that relied heavily on e-mail to communicate with the press and to influence news coverage.[153] Similarly, both

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male voters by advertising on such cable channels as The Golf Channel, Travel & Leisure, and CNBC. *See* Jeff Zeleny, *Politicians Tuning in to Voters' Favorite Shows*, CHI. TRIB., Mar. 30, 2004, at C1 ("Bush was able to directly target his supporters by demographics, rather than geography, through advertising on specialty cable channels."); *see also* Holly Yeager, *Bush Team Uses Cable TV to Target Specific Groups*, FIN. TIMES (London), Mar. 17, 2004, at 10 ("[The Bush campaign] is using Speed Channel and FX, both owned by Fox, to go after 'Nascar dads,' the stock-car racing fans who some pollsters say could determine the winner of the election.").

147. One example of how the Internet can be used for targeted advertising is evident in the recent campaign for mayor of New York. Michael Bloomberg employed an innovative Internet-based advertising campaign that targeted readers of the *New York Times* website, http://www.nytimes.com, based on zip code, which the *New York Times* collects when users register on the site. *See* Nicholas Thompson, *Machined Politics*, WASH. MONTHLY, May 2002, at 31.

148. For instance, when visitors first entered Al Gore's website during the 2000 presidential campaign, they were greeted by a brief form asking them to provide their e-mail address, zip code, and home state. White, *supra* note 131.

149. When individuals make online contributions, campaigns can request that donors also provide information that can then be used as part of its database compilation and e-mail targeting system. CORNFIELD & SIEGER, *supra* note 138, at 6.

150. *Id.* at at 4.

151. *Cf. id.* at 16 (describing candidates' use of e-mails to supporters during the "virtual primary"—the period lasting from the day after the last presidential election until the day before the first primary for the next presidential election—to "draw attention to media coverage, influence online polls, and encourage supporters to spread the word about the campaign.").

152. MICHAEL CORNFIELD & LEE RAINIE, INST. FOR POLITICS, DEMOCRACY, & INTERNET & PEW INTERNET & AM. LIFE PROJECT, UNTUNED KEYBOARDS: ONLINE CAMPAIGNERS, CITIZENS, AND PORTALS IN THE 2002 ELECTIONS 9 (2003), *available at* http://www.pewinternet.org/reports/pdfs/PIP_IPDI_Politics_Report.pdf.

153. Adam Nagourney, *Another Clinton War Room, Ready for Battle*, N.Y. TIMES, Sept. 15, 2000, at A1 (noting that Mrs. Clinton's campaign employed "about a dozen people who research Mr. Lazio's background and record, write Mrs. Clinton's policy pronouncements and, most important, seek to influence the news coverage of Mrs. Clinton's campaign for Senate, mostly through an insistent barrage of e-mail messages intended to advance the first lady and undercut Mr. Lazio").

the Bush and Gore campaigns relied heavily on e-mail, often sending out multiple e-mails per hour to the press.[154]

Internet-based communications also allow for a different type of message targeting—time-based targeting. Unlike television advertising, regular mail, and telemarketing—which usually only reach people in their homes—and radio—which often reaches people only during their commutes—the Internet, which more and more Americans use at work, often to check e-mail and to engage in non-work-related surfing, is accessible to people throughout the day.[155] As a result, candidates can use the Internet not only to target specific messages to particular voters, but also to target voters at times when they are beyond the reach of other media.

In sum, the ability to individualize messages over nontraditional media both increases the quality of information that voters receive and the overall competitiveness of campaigns. By customizing messages for particular audiences, campaigns can make those messages far more detailed and relevant to voters than general advertisements distributed over broadcast media. In addition, campaigns can use message targeting to communicate with important "swing" voters on issues that are important to them, thus increasing the candidates' competitiveness.[156]

C. *Interactivity*

The Internet allows for two types of interactivity—vertical and horizontal. Vertical interactivity occurs when campaigns and voters interact directly in two-way communication; horizontal interactivity occurs when supporters of a campaign interact directly with one another without going through any campaign-controlled intermediary. Some candidates have already begun to exploit these specialized capabilities of the Internet, and their efforts indicate how other federal candidates, with the help of the resources provided by the Trust Fund, could utilize this medium to communicate with voters in a way and to an extent that would otherwise be impossible. These examples demonstrate how the Internet can increase both the quantity and quality of information exchanged between candidates and voters during campaigns, improving democratic discourse in the United States in the process.

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154. Peter Marks, *In Bush-Gore Race, 3 Words For Media: 'You've Got Mail,'* N.Y. TIMES, June 1, 2000, at A1 ("[J]ust as e-mail has ushered in a new era of epistolary ease and connectedness for the world at large, it has also created a hyper-efficient form of press release, a paperless document that not only links the political world to the nation's assignment editors, columnists and news anchors in seconds, but also allows the campaigns to fire at each other at will, all day long.").

155. CORNFIELD & SIEGER, *supra* note 138, at 5, 28 fig.6.1.

156. *See* Sloan, *supra* note 122 ("Imagine the benefit of [targeting] for the Bush campaign or the Democratic nominee. Concerned about 10 key states? Target a flood of online ads on the ZIP Codes and demographic groups that may tip the balance there. Facing a gender gap? Target online ads directly on the gender you're trying to reach.").

Currently, the most frequently occurring form of vertical interactivity—responding to emails sent by voters[157]—is also the most basic. However, far more sophisticated possibilities exist. Lamar Alexander's 2002 Senate campaign used a technology called "Groopz" which permitted visitors to Alexander's website to have live chats with campaign staff and volunteers.[158] This type of interaction with voters would have been impossible via television, radio, or other forms of media typically utilized by campaigns, and would have been overwhelmingly time-consuming if done over the telephone. Although this technology is not yet widely utilized,[159] the availability of Internet-specific funds could provide the necessary catalyst for its more widespread adoption, thus improving the dissemination of information that voters need to make informed decisions about candidates.

The Internet can also transform typically static methods of reaching voters, such as advertising, into vehicles for two-way communication. For instance, online "click-through" ads can enable an interested viewer, if she chooses, to sign-up for a campaign's mailing list, volunteer for a campaign, or contribute money to a candidate, all at the click of a button.[160]

The increasing use of blogs constitute another example of vertical interactivity. Howard Dean spearheaded the use of blogs, or frequently updated Internet-based journals, in campaigns.[161] After Dean launched his blog, six of his eight rivals for the Democratic nomination, as well as President Bush, also created blogs.[162] Blogs usually allow viewers to comment on posted material, and they often permit candidates or campaign staff members to respond to these comments. In doing so, they create an ongoing dialogue between voters and campaigns, in which each can directly respond to the statements, questions, and concerns of the other.

Blogs also allow for horizontal interactivity. Not only do individual blog authors (or "bloggers") often allow readers to comment on their own postings, but they also often link their websites to those of other bloggers and engage in

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157. *Cf.* CORNFIELD & RAINIE, *supra* note 152, at 9 (discussing the results of a survey of campaign webmasters in which respondents described how incoming email is processed).

158. Nicholas Thompson, *No, Really, This One's a Net Election*, SLATE, Nov. 4, 2002, *at* http://slate.msn.com/id/2073475 (last visited Mar. 22, 2004). The technology allowed staffers to respond directly to voters' specific concerns, either by e-mailing back prepared texts, responding to questions live, or "pushing" visitors to pages with relevant information. *Id.*

159. Only three percent of congressional campaign websites provided moderated discussion forums in 2000, according to a study conducted by the Annenberg Public Policy Center. STEVEN M. SCHNEIDER, ANNENBERG PUB. POLICY CTR., CONGRESSIONAL CANDIDATE WEB SITES IN CAMPAIGN 2000: WHAT WEB ENTHUSIASTS WANTED, WHAT CANDIDATES PROVIDED 4 tbl.4 (2000).

160. *See* Schroeder, *supra* note 130.

161. One of the primary sites that provides the enabling software for blogs, Blogger.com, described a blog as "a web page made up of usually short, frequently updated posts that are arranged chronologically—like a what's new page or a journal." Blogger, About, *at* http://www.blogger.com/about.pyra (last visited Mar. 22, 2004).

162. Brian Faler, *Add 'Blog' to the Campaign Lexicon*, WASH. POST, Nov. 15, 2003, at E4.

ongoing exchanges with them.[163] The Internet allows for horizontal interactivity in other ways as well. Websites like Meetup.com have developed with the specific intent of virtually connecting groups of individuals with shared interests and then facilitating their physically meeting one another at local venues—all without any organizational effort by central campaign offices.[164]

By greatly enhancing the ability of voters to communicate both with candidates and with other citizens about political issues, these two forms of interactivity not only increase the total amount of information people have about campaigns, but also contribute to the functioning of our deliberative democracy. In addition, horizontal interactivity removes a bottleneck found in traditional models of organizing by empowering campaign supporters to coordinate with one other without the assistance of the central campaign office, thus increasing the ability of resource-poor campaigns to be competitive.

D. *Immediacy*

Not only does the Internet enable candidates to communicate directly with voters and to engage in interactive dialogues with them, but it also liberates them from the delays inherent in relying on other forms of media to reach voters. Unlike television, radio, or billboards—advertisements on which must be produced and procured in advance—or even direct mail—which must travel through the postal system—the Internet allows for direct and immediate communication, freeing candidates from the time delays imposed by relaying their messages through the gatekeepers of other media.

Campaigns' greater utilization of blogs reflects the timing advantages of Internet-based campaigning. Blog-pioneer Howard Dean used his blog to provide a daily account of his activities, to offer discussions of his positions, to alert readers to articles of interest in other publications, and, perhaps most importantly, to respond immediately to breaking news or accusations. For example, when a newspaper published an article suggesting that Dean changed his position on the death penalty for political reasons, Dean utilized his blog to quickly respond to the accusations.[165] In addition to blogs, Internet-based advertising can also be used by campaigns to get messages out quickly—either to respond to opponents or to take advantage of recent events.[166] For instance, President Bush's campaign used footage from an interview he had given on a

163. *See* A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 860 & n.500 (2003).

164. *See supra* notes 133-136 and accompanying text.

165. *Dean: Carpe Diem*, HOTLINE, June 16, 2003, LEXIS, News & Business Library, Hotline File.

166. Sloan, *supra* note 122 ("Online ads will be especially appealing to the political community because they can be put up quickly and changed on the fly, even allowing a response in real time to breaking news or an opposing candidate's charges.").

Sunday-morning interview program in an Internet advertisement it distributed two days later to promote his foreign policy programs.[167]

The immediacy of the Internet also offers advantages when it comes to raising money. Internet-based fundraising can capture the enthusiasm of voters following major events or victories in a manner that would be difficult with other forms of raising funds. For example, when John McCain decisively won the 2000 New Hampshire primary, he possessed an established website that allowed those excited by his victory to immediately donate to his campaign.[168] Without the Internet, McCain's ability to exploit his victory for fundraising purposes would have been severely diminished.[169] Similarly, Senators John Kerry and John Edwards utilized Internet fundraising to capitalize on the excitement surrounding their strong finishes in the Iowa caucuses in January 2004.[170] In March 2004, in the twenty-four-hour period after he had effectively secured the Democratic nomination, Senator Kerry raised a record amount of money, $1.2 million, in contributions over the Internet.[171]

The timing advantages of the Internet can also have a major impact on mobilizing supporters on election day. During the 2002 Democratic gubernatorial primary in Illinois, Rod Blagojevich utilized a sophisticated Internet-based get-out-the-vote operation to achieve his narrow victory; this maneuver would have been impossible had his campaign been forced to rely on traditional methods of mobilization.[172] Jean Carnahan's win in the 2000 Missouri Senate race also depended on Internet-based get-out-the-vote efforts,[173] and Mark Warner's strong victory in the 2001 Virginia gubernatorial election relied in part on a similar operation.[174] During the 2002 elections, Speaker of the House Dennis Hastert organized an "online 72-hour strike

167. Elizabeth Jensen, *Bush Ad Excerpt Rankles NBC News*, L.A. TIMES, Feb. 11, 2004, at A22.

168. After McCain won the primary, people began contributing to his campaign over the Internet at the rate of $30,000 per hour; four days later, McCain's Internet donations totaled over $2 million. CORNFIELD & SIEGER, *supra* note 138, at 10-11.

169. Jeremy Derfner, *So, Was It a Net Election?*, SLATE, Jan. 26, 2001 ("Although he eventually lost to Bush in South Carolina, the Web harnessed McCain's New Hampshire momentum, which might otherwise have dissipated in an underfunded ground operation."), *at* http://slate.msn.com/id/97767 (last visited Mar. 22, 2004).

170. *See* Julia Malone, *Iowa Surge for Kerry and Edwards Yields Campaign Cash*, COX NEWS SERVICE, Jan. 22, 2004, LEXIS, News & Business Library, Wire Service Stories File; *All Things Considered* (NPR radio broadcast, Jan. 20, 2004).

171. Mark Z. Barabak & Maria L. La Ganga, *Bush-Kerry Fight Off to Quick Start*, L.A. TIMES, Mar. 4, 2004, at A1.

172. *See* Thompson, *supra* note 147, at 27. On election day, Blagojevich's campaign regularly monitored voter turnout at 350 "indicator precincts" across the state. If turnout was low in a county that the campaign expected to win, it immediately mobilized local volunteers to engage in traditional get-out-the-vote activities, such as going door-to-door and contacting likely voters. As Thompson concludes: "[T]he campaign [theoretically] could have done the same sort of compiling before the Internet, with pen, paper, and calculators. It just would have taken several days—by which time their candidate would have been home eating cold soup." *Id.*

173. *Id.* at 29-30.

174. *Id.* at 31.

force" designed to rally voters electronically.[175] Each of these campaigns' reliance on the Internet for increasing turnout on election day demonstrates the powerful impact that the Internet can have on elections—and provides a glimpse of how savvy candidates could utilize Trust Fund money to increase the competitiveness of future campaigns.

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Unlike previously proposed free air time plans, the Proposal does not merely assist candidates with campaign activities on which they already rely—namely, advertising on broadcast television—but also seeks to shape their overall approach to campaigning in a way that should benefit both their candidacies individually as well as the operation of the democratic process as a whole. Through its provision of Internet-specific funds, the Proposal places special emphasis on the increased use of a medium not traditionally used by candidates, but one that is particularly useful for addressing many of the problems of modern campaigns. Given the unique qualities of the Internet, its more widespread use would both increase the quantity and quality of information disseminated in campaigns—improving the ability of voters to make decisions within the democratic process—and also increase electoral competitiveness by facilitating the ability of less well-funded candidates to engage in certain key campaign activities, such as engaging in meaningful communication with voters, organizing and mobilizing supporters, and raising campaign funds. Although the Internet will probably never replace traditional methods of campaigning, it can supplement them in beneficial ways. By including resources specifically designated for Internet-related campaigning, the Proposal reconceptualizes what can be accomplished by a free air time plan.

VI. THE LAW: WHY THE PROPOSAL IS CONSTITUTIONAL

The Proposal offered by this Note likely would be subject to numerous legal challenges. Broadcast and cable operators may claim that various elements of the Proposal amount to a taking in violation of their Fifth Amendment rights as well as violate their First Amendment rights of free speech and association. This Part reviews these possible grounds for challenge and concludes that the Proposal would survive constitutional scrutiny. These issues are obviously complex and implicate some complicated areas of law, making a comprehensive examination of these legal concerns beyond the scope of this Note. As a result, the Note merely provides a brief overview of these matters in order to highlight the relevant issues and to suggest why the Proposal would survive legal scrutiny.

175. Thompson, *supra* note 158.

A. *The Spectrum Use Fee, Reasonable Access Rules, and Revised Lowest Unit Charge Rule Do Not Amount to a "Taking" Under the Fifth Amendment*

Broadcasters will likely claim that the spectrum use fee and the revised lowest unit charge rule included in the Proposal amount to takings of their property without just compensation, which is prohibited by the Fifth Amendment. However, under the Communications Act of 1934 and relevant case law, such a takings challenge has no validity. Section 304 of the Act requires broadcast license applicants to "waive[] any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."[176] The U.S. Supreme Court emphasized that this section of the Act clearly indicates Congress's intent that "no person is to have anything in the nature of a property right as a result of the granting of a license."[177]

Although the government has not chosen to charge broadcasters a fee for using their licenses in the past, nothing prevents it from assessing such a "rental charge" in the future.[178] In fact, in its 2004 budget, the Bush administration included billions of dollars in projected rent charges for broadcasters' occupation of both the analog and digital spectrums after 2006.[179] Nor does the imposition of a spectrum use fee necessarily relieve broadcasters of their public interest obligations. Congress or the FCC can adjust the requirements of a license without forfeiting its ability to impose public interest obligations on license holders. For instance, the federal government charges satellite broadcasting companies billions of dollars for their spectrum licenses (which were assigned by auction), yet still requires satellite television providers to set aside space for public services.[180] Furthermore, the use of money raised from

176. 47 U.S.C. § 304 (2000).

177. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); *see also* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 331 (1945).

178. *See* 47 U.S.C. § 316(a)(1) (2000) ("Any station license or construction permit may be modified by the [FCC] either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . .").

179. OFFICE OF MGMT. AND BUDGET, ANALYTICAL PERSPECTIVES, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 92 tbl.5-3, 94 (2003), *available at* http://www.whitehouse.gov/omb/budget/fy2004/pdf/spec.pdf.

180. 47 U.S.C. § 335 (2000); *see also* TAYLOR & ORNSTEIN, *supra* note 8, at 8 (describing how satellite television providers are required "to submit to government regulation and provide space for other public purposes" even though they paid large sums for their spectrum licenses). While not proposing a free air time proposal per se, some commentators have suggested that all of broadcast stations' public interest obligations, including the lowest unit charge rules, should be replaced by a five percent spectrum fee that could fund measures such as the Trust Fund. *See, e.g.*, HENRY GELLER & TIM WATTS, THE FIVE PERCENT SOLUTION: A SPECTRUM FEE TO REPLACE THE 'PUBLIC INTEREST OBLIGATIONS' OF BROADCASTERS 12 (New America Foundation, Spectrum Series Working Paper No. 3, 2002), *available at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File_844_1.pdf. However, addressing the negative impact of broadcast advertising on the costs of campaigns requires not only

the spectrum use fee to fund communication activities on non-broadcast media does not strengthen the broadcasters' takings claim. Congress is free to earmark funds it raises for any purpose it wishes.[181] Therefore, the imposition by Congress of new conditions on broadcasters' licenses does not amount to a taking because broadcasters have no property interest in their licenses.[182]

The takings issue with regard to cable operators is different in two ways, but the validity of such a takings claim is equally doubtful. First, there is no federal law that conditions cable companies' operation on a waiver of any asserted property interest in cable air time, nor has the Supreme Court ruled on this issue. Second, the cable companies' takings claim would not be based on the imposition of a fee, but would rather be limited to the issue of whether the reasonable access and lowest unit charge rules constitute a taking. The cable companies would likely claim that by requiring them to sell advertising time at reduced rates to political candidates, the Proposal upsets their investment-backed expectation to sell available advertising time to the highest bidders. Even assuming that cable companies have a property right over their air time, case law indicates that the Proposal does not constitute a regulatory taking. Because cable stations would still be compensated for their time under the Proposal, albeit at the lowest unit charge rate, the Proposal could only be construed as a partial, rather than complete, taking. However, the Supreme Court's jurisprudence makes it clear that a regulation that substantially diminishes the value of an owner's property does not constitute a taking as long as that regulation serves a government interest of comparative significance.[183]

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providing candidates with resources to fund campaign activities, but also ensuring that these funds can be used to buy reasonably priced advertising time. Any effective reform must ensure that the provision of advertising subsidies does not create inflationary pressure on the price of advertising, with broadcast stations simply raising their prices to capture the value of this additional resource. Furthermore, other aspects of broadcasters' public interest obligations, including the reasonable access rules and the obligations related to children's programming, are important and would be lost if a spectrum fee replaced all of the public interest obligations of broadcasters. Instead of "the five percent solution," the imposition of a smaller fee along with the retention of the various public interest obligations, both those relating to political campaigns and those furthering to other purposes, represents a superior course of action.

181. *See id.* at 12-13 (discussing potential uses for the proceeds from a spectrum fee assessed against broadcasters, including the possibility of funding a "Digital Opportunity Investment Trust," which would "support innovative uses of digital technology for education, lifelong learning, and the transformation of our civic and cultural institutions").

182. *See supra* notes 176-178 and accompanying text; *see also, e.g.*, Hundt, *supra* note 37, at 1109 ("[U]nder the Communications Act it is crystal clear that broadcast licensees have no property claim to the airwaves or to a particular frequency. Takings claims are fatally undermined by this fact." (footnotes omitted)); Levinson, *supra* note 94, at 172-76 (addressing and refuting broadcasters' arguments that free air time measures constitute an unconstitutional taking without just compensation).

183. Although there is no "set formula" for evaluating whether a regulatory taking has occurred—courts instead utilize "essentially ad hoc, factual inquiries," Penn Cent. Transp. Co. v. New York City, 438 U.S 104, 131 (1978)—the Supreme Court has regularly held that a regulation can substantially diminish the value of a property without constituting a taking. *See generally id.* (noting that "diminution in property value, standing alone," does not establish a taking but that the issue "is resolved by focusing on the uses the regulations permit"); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (sustaining a zoning regulation even though it resulted in a seventy-five percent diminution in the value

The government interest in these measures—improving the proper operation of the democratic process—is undeniably substantial.[184] Therefore, even if one accepts that cable companies have a property interest in their air time, the fact that the regulation results in a diminution of its value does not make it an unconstitutional taking.

B. *The Revised Lowest Unit Charge and Existing Reasonable Access Rules Do Not Violate Broadcasters' First Amendment Rights*

The imposition of the revised lowest unit charge and existing reasonable access rules on broadcasters is constitutional under the First Amendment. The Communications Act of 1934 grants the FCC the ability "as public convenience, interest, or necessity requires . . . [to m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[185] In assessing the ability of the federal government to impose obligations on broadcasters under this section of the Act, the Supreme Court has recognized that broadcasters are entitled to less First Amendment protection than other media. In *NBC v. United States*,[186] the Court articulated the differences between the First Amendment rights of broadcasters and those of other media. Because of the scarcity of the spectrum, which limits the number of people who can engage in broadcasting, the Court held that the federal government possesses a legitimate interest in creating a licensing system to ensure that the spectrum is used effectively—both technically and in furtherance of the public interest.[187] As a result, the Court concluded that the First Amendment allows the federal government to exercise broad discretion in regulating broadcasters as part of its efforts to guarantee the spectrum is used in the public interest.[188]

In the landmark case of *Red Lion Broadcasting Co. v. FCC*,[189] the Court strongly affirmed the ability of the federal government to impose certain types of content-based regulations on broadcasters by focusing on the First Amendment rights of *the audience* rather than those of the broadcasters. As the Court stated, "No one has a First Amendment right to a license or to monopolize a radio frequency . . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[190] Referring to the

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of an owner's property); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding an ordinance despite at least 87.5 percent diminution in value).

184. *See, e.g.*, *infra* notes 197-203 and accompanying text.

185. 47 U.S.C. § 303(r) (2000).

186. 319 U.S. 190 (1943)

187. *Id.*

188. *Id.* at 226-27.

189. 395 U.S. 367 (1969).

190. *Id.* at 389-90.

scarcity of the broadcast spectrum, the Court later noted that "[i]t does not violate the First Amendment to treat licensees . . . as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."[191] Although some Justices,[192] lower courts,[193] commentators,[194] and, unsurprisingly, the broadcast industry itself[195] have questioned the ongoing validity of the scarcity rationale as a justification for lesser First Amendment protection for broadcasters, the Supreme Court continues to uphold it. In 1994, in *Turner Broadcasting System, Inc. v. FCC* (*Turner I*), the Court stated: "Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence . . . and see no reason to do so here."[196]

Therefore, any evaluation of obligations imposed on broadcasters must take into account the First Amendment rights of listeners or viewers, and these First Amendment interests are particularly strong in matters relating to campaign speech. The Court has stated that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"[197] and that "speech concerning public affairs is . . . the essence of self-government."[198] Furthermore, it has explained that "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."[199]

As a result, the Supreme Court has granted Congress and the FCC wide discretion in imposing requirements on broadcasters as part of their public interest obligations, particularly when these requirements relate to campaign speech. For instance, in *Red Lion*, the Court upheld the "Fairness Doctrine,"

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191. *Id.* at 394.

192. *See, e.g.*, CBS v. Democratic Nat'l Comm., 412 U.S. 94, 144 (Stewart, J. concurring); *id.* at 158 n.8 (Douglas, J., concurring).

193. *See, e.g.*, Action for Children's Television v. FCC (Act III), 58 F.3d 654, 673-76 (D.C. Cir. 1995) (Edwards, C.J., dissenting); Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

194. *See, e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-30 (1982); Douglas C. Melcher, Note, *Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedoms of Broadcasters*, 67 GEO. WASH. L. REV. 100, 114-19 (1998).

195. *See, e.g.*, P. CAMERON DEVORE, THE UNCONSTITUTIONALITY OF FEDERALLY MANDATED "FREE AIR TIME" (1998) (outlining the National Association of Broadcasters' arguments against the constitutionality of free air times proposals, as submitted to the Presidential Advisory Committee on Public Interest Obligations of Digital Television Broadcasters), *at* http://www.ntia.doc.gov/pubintadvcom/marchmtg/DeVore.htm (Mar. 2, 1998).

196. 512 U.S. 622, 638 (1994) (footnote omitted).

197. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

198. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

199. Buckley v. Valeo, 424 U.S. 1, 52-53 (1976).

which required broadcasters to give candidates a right of reply when they were criticized on air.[200] In *CBS v. FCC*, the Court upheld a law requiring broadcasters to provide legally qualified candidates reasonable access to their airwaves.[201] As part of its ruling, the Court noted that the reasonable access provision of the Communications Act of 1934 "enhanc[es] the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process" and thus "properly balances the First Amendment rights of federal candidates, the public, and broadcasters."[202] Likewise, in upholding the equal time requirements in *Farmers Educational & Cooperative Union v. WDAY*, the Court recognized that the purpose of those requirements was to "facilitate political debate over radio and television."[203]

This line of cases, and the rationale that they employ, indicate that the reasonable access and revised lowest unit charge rules contained in the Proposal would withstand constitutional challenge. Both rules are manifestations of a long-upheld power of the federal government to regulate broadcasters to advance voters' ability to receive political speech. The rules guaranteeing reasonable access to broadcast stations—which remain unchanged in the Proposal—have already been upheld by the Court.[204] Like the reasonable access rules, the revised lowest unit charge rules are also a valid congressional imposition of public interest obligations on broadcasters. These rules improve the ability of candidates to communicate with voters by increasing the accessibility of the airwaves, and hence serve to "promote free speech principles by facilitating a better informed electorate and the more effective operation of the democratic process."[205]

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200. 395 U.S. 367 (1969).

201. 453 U.S. 367 (1981). In contrast, in *CBS v. Democratic National Committee,* 412 U.S. 94 (1973), the Court struck down a rule requiring stations to accept paid editorial advertisements. Thus, these two decisions indicate the solicitude that the Court grants restrictions on broadcasters specifically designed to promote *candidate* speech.

202. 453 U.S. at 396-97.

203. 360 U.S. 525, 534 (1959).

204. *See supra* notes 201-202 and accompanying text.

205. ANGIE A. WELBORN, CONG. RESEARCH SERV., CONSTITUTIONAL ANALYSIS OF TORRICELLI AMENDMENT TO THE BIPARTISAN CAMPAIGN REFORM ACT OF 2001 (2001) (analyzing the constitutionality of the Torricelli Amendment, upon which the Proposal's revision of the lowest unit charge is based), *reprinted in* ALLIANCE FOR BETTER CAMPAIGNS, LOWEST UNIT CHARGE: COMBATING THE BROADCAST INDUSTRY'S MISINFORMATION CAMPAIGN (2001), *at* http://www.bettercampaigns.org/reports/display.php?PageID=5 (last visited Mar. 22, 2004); *see also* Memorandum from Elizabeth Daniel, Brennan Center for Justice, The Lowest Unit Charge Amendment to McCain-Feingold is Constitutional (May 10, 2001) (stating that the Torricelli Amendment "is not only constitutional, it furthers important First Amendment values vital to a vibrant democracy"), *reprinted in* ALLIANCE FOR BETTER CAMPAIGNS, *supra*, *at* http://www.bettercampaigns.org/reports/display.php?PageID=7.

C. *The Revised Lowest Unit Charge and Reasonable Access Rules Do Not Violate Cable System Operators' First Amendment Rights*

Although cable operators receive greater First Amendment protection than broadcasters, recent Supreme Court decisions indicate that content-neutral regulations of cable, such as the ones contained in the Proposal, can be upheld under an intermediate scrutiny standard. In *Turner I*, the Court specifically declined to apply the same First Amendment standard to cable as it did to broadcast because the scarcity rationale does not apply to the former.[206] However, the Court also rejected the proposition that all regulations of cable merit strict scrutiny review. It stated that laws that are "speaker partial" are not presumptively invalid; rather, these laws only require strict scrutiny when "they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."[207] Thus, the fact that a law prefers certain speakers over others does not necessarily demand strict scrutiny review.

In applying these principles to the "must carry" regulations at issue in *Turner I*, which require cable system operators to carry certain broadcast stations, the Court stated that the broad applicability of the regulations—that is, the fact that they apply to almost all cable systems—indicates that they are not "structured in a manner that carries the inherent risk of undermining First Amendment interests."[208] Although "the provisions interfere with cable operators' editorial discretion," strict scrutiny was not warranted due to the fact that "the extent of the interference does not depend upon the content of the cable operators' programming."[209] Furthermore, the structure of the regulations does not allow "an operator [to] avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers."[210] The Court thus concluded that the regulations were content neutral and subject to intermediate scrutiny.[211] The case was remanded to determine if the economic rationale cited

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206. 512 U.S. at 637-39.

207. *Id.* at 658 (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983)).

208. *Id.* at 661. The Court cited *Leathers v. Medlock*, 499 U.S. 439 (1991), as an example of another regulation it upheld because its wide applicability indicated that there was not a sufficient threat to First Amendment freedoms to merit strict scrutiny. In *Leathers*, the Court upheld a state sales tax applicable to many cable systems "offering a wide variety of programming" because the tax was not "likely to stifle the free exchange of ideas." *Id.* at 449, 453. The Court contrasted this sales tax and the *Turner I* "must carry" regulations with those it invalidated in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). These latter regulations, the Court stated, were far more narrowly focused on a small number of speakers, risking much greater danger of government suppression of ideas. *Turner I*, 512 U.S. at 659-61.

209. *Id.* at 643-44.

210. *Id.* This differentiated the "must-carry" regulations from the right-of-reply rules at issue in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). For a more complete discussion of the differences between these two regulations, see *infra* notes 223-225 and accompanying text.

211. 512 U.S. at 662 (citing *United States v. O'Brien*, 391 U.S. 367 (1968), for the applicable

by the government justified the regulation under the intermediate scrutiny standard.

When the case returned to the Court in *Turner Broadcasting System, Inc. v. FCC* (*Turner II*), the Court upheld the constitutionality of the "must carry" provisions under the intermediate scrutiny standard.[212] The Court stated again that "a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[213] In determining that the governmental interest cited in this case was important, the Court, like the district court, based its decision on the extensive factual record that had been developed on remand, which contained substantial evidence supporting Congress's judgment that the regulations furthered important governmental interests and were narrowly tailored to promote those interests. In its ruling, the Court emphasized that it owes Congress's findings deference because of the latter branch's particular competence to analyze the large amounts of evidence relating to legislative questions.[214] It noted that this deference applies even in regard to regulatory policies implicating First Amendment interests.[215] As a result, under the Court's decisions in *Turner I* and *Turner II*, even speaker-partial regulations of cable operators will be considered content neutral and thus evaluated under an intermediate scrutiny standard as long as they do not evince a preference for what the favored speakers have to say.[216]

Based on the *Turner* model of First Amendment analysis for regulations of cable operators, the reasonable access and lowest unit charge provisions of the Proposal would withstand constitutional scrutiny. The *Turner* model dictates that intermediate scrutiny is the proper standard to apply to the reasonable access and lowest unit charge provisions. The Court's decisions indicate that these provisions' partiality to a particular type of speaker—political candidates—does not necessarily require the application of strict scrutiny because these provisions do not reflect a preference for the substance of what the favored speakers have to say. Any candidate who qualifies under the

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standard for evaluating content-neutral regulations). Under the *O'Brien* standard, a content-neutral law will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

212. 520 U.S. 180 (1997).

213. *Id.* at 189.

214. *Id.* at 195.

215. *Id.* at 196.

216. An example of the application of the *Turner* principles to other forms of cable regulation beside "must carry" provisions can be found in *Time Warner Entertainment Co. v. FCC* (*Time Warner I*), 56 F.3d 151 (D.C. Cir. 1995). Relying on *Turner I*, the D.C. Circuit found that cable rate regulations should be subject to intermediate scrutiny. Applying that standard, the court upheld the constitutionality of the regulations.

Proposal, whether a Republican, Democratic, or member of a third party, receives the benefits of these provisions. In addition, the structure of the reasonable access and lowest unit charge rules indicates they do not pose inherent dangers to free expression. They do not single out particular cable operators or programmers, but rather are universally applied. Although these provisions interfere to some extent with cable operators' editorial discretion, the extent of this interference does not depend on the cable operators' programming, and cable operators can not mitigate their obligation by altering their programming. Moreover, the provisions impose merely an incidental burden on cable operators' speech. Although the regulations require cable operators to allow candidates to advertise and pay reasonable rates, they do not in any way impact cable operators' programming decisions. All of these factors indicate that the reasonable access and lowest unit charge provisions as applied to cable operators are content-neutral regulations for which an intermediate level of scrutiny is the proper standard of review.

The application of the intermediate level of scrutiny to these provisions clearly demonstrates their constitutionality. As the Court stated, a content-neutral regulation "will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[217] The provisions further an important governmental interest: facilitating the operation of the democratic process both by increasing the dissemination of political information that voters require to make decisions and by enhancing the competitiveness of campaigns. The Supreme Court recognized the importance of this interest in *Buckley* and other cases.[218] In addition, this interest is unrelated to the suppression of free speech—in fact, the Proposal is intended to *increase* the quantity and quality of speech disseminated through various campaign media. Moreover, the reasonable access and lowest unit charge rules are narrowly tailored to achieve the Proposal's goals, properly balancing the government's interest in a robust deliberative democracy with the speech rights of cable operators. These regulations only apply during the most critical periods for campaigns—forty-five days before a primary election and sixty days before a general election. They also only affect cable advertising, leaving cable operators' programming decisions entirely up to them. Finally, in order for the provisions to pass constitutional muster under the intermediate scrutiny standard, the *Turner* decisions indicate Congress must develop a factual record to support its judgment that the regulations further important governmental interest and are narrowly tailored to promote those interests. Based on the multiple

217. *Turner II*, 520 U.S. at 189.
218. *See supra* notes 197-203.

Congressional investigations into these and related issues, developing such a record should pose no difficulty.[219]

The constitutionality of the reasonable access provision is not compromised when applied to a cable station dedicated to a particular point of view. Some cable channels engage in programming that promotes specific religious views or political beliefs. Under the Proposal, these channels would be required to run advertisements by all candidates, including those who promote views antithetical to their own. Nonetheless, the Court's decisions indicate that the Proposal's reasonable access requirement would still survive constitutional challenge, whether on compelled speech or expressive association grounds.

As a threshold matter, the Court has upheld numerous content-neutral regulations despite their negative impact on protected political or religious speech.[220] The fact that a regulation impedes or otherwise affects an entity's ability to engage in protected speech does not constitute sufficient grounds to invalidate the regulation as long as it is content neutral. Thus, even if a specific cable station can show that the Proposal's reasonable access provision interferes with its ability to communicate its viewpoint, that alone will not be enough to sustain a constitutional challenge to the regulation.

A cable station that promotes a particular viewpoint may claim that the reasonable access provision constitutes impermissibly compelled speech, but this argument would likely fail. In the realm of media structural regulation, the Court has upheld numerous content-neutral laws that require media entities to allow others to use their facilities, even if this use by outsiders might conflict with the media entities' own message and even though it has invalidated analogous measures when applied to individuals or other associations.[221] The Court's decisions reveal the extent to which the government may mandate outsider access to media. In *Turner I*, the Court explicitly delineated the differences between acceptable and unacceptable mandated-access measures by contrasting the "must-carry" rules it upheld in that case with the measures it struck down in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[222] and *Miami Herald Publishing Co. v. Tornillo*.[223] First, unlike the

219. *See, e.g.*, CANTOR ET AL., *supra* note 2 (discussing congressional proposals, hearings, and other activity on these and related issues throughout the years); *see also* 147 CONG. REC. S2603-18 (daily ed. Mar. 21, 2001) (Senate debate on Torricelli Amendment); 148 CONG. REC. H417-20 (daily ed. Feb. 13, 2002) (House debate on Torricelli Amendment).

220. *See, e.g.*, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981); Kovacs v. Cooper, 336 U.S. 77 (1949).

221. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 933 (2002) (citing as examples *Turner II*, 520 U.S. at 180; Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); CBS v. FCC, 453 U.S. 367 (1981); and Red Lion Broadcasting, Inc. v. FCC, 395 U.S. 367 (1969)). Baker suggests a rationale for the Court's apparently dichotomous approach: Since none of these cases involved any censorship, the Court approved compelled speech in order to "to improve the overall communications environment in relation to a free press," an important interest that is lacking in analogous cases involving compelled individual speech. *Id.* at 938.

222. 475 U.S. 1 (1986) (involving a rule that required a private utility to include in its monthly bills

content-neutral "must-carry" rules, the access rights in *Tornillo* and *Pacific Gas & Electric* were only triggered when the regulated entities engaged in specific content-based speech.[224] Second, unlike the regulations invalidated in these two cases, the access rights granted to broadcasters by the "must-carry" rules could not be diminished if the regulated cable entities changed the content of their speech; as a result, the regulations did not provide cable companies an incentive to reduce their speech in order to avoid triggering access rights.[225]

Like the "must-carry" rules at issue in *Turner I*, the reasonable access rights guaranteed to political candidates under the Proposal are also within the bounds of permissible government regulation of the media. First, the access rights are not content based, but rather allow candidates access to cable advertising time regardless of any individual cable station's message. Second, the access rights cannot be diminished if the regulated cable stations change the content of their messages or alter their specific viewpoints. As a result, the Proposal's reasonable access provision would survive a challenge based on the compelled speech doctrine.

A cable station with a distinctive political or social message may alternately claim that, based upon its right to expressive association, it is constitutionally impermissible to force it to associate its content with commercials promoting views contrary to its own. However, this claim would likely also fail. Courts have historically failed to grant expressive association protections to the press.[226] However, even if a cable station could be considered an "expressive association" and receive all of the concomitant rights and protections, the reasonable access rules would still survive constitutional scrutiny. In *Boy Scouts of American v. Dale*, the Court explained that entities entitled to expressive association rights can nonetheless be subjected to measures that impede those rights if they are "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[227] As discussed above,

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each quarter a newsletter published by a consumer group critical of its policies).

223. 418 U.S. 241 (1974) (involving a right-of-reply statute that allowed political candidates to receive space in a newspaper, free of charge, whenever the newspaper included content critical of their character).

224. *Turner I*, 512 U.S. at 655-56.

225. *Id.* at 656.

226. *See* Christopher R. Edgar, Note, *The Right to Freedom of Expressive Association and the Press*, 55 STAN. L. REV. 191, 233-34 (2002) ("[C]ourts have historically refused to apply the [expressive associations] balancing test when faced with similar claims by press entities. Instead, courts have almost uniformly dismissed such claims on the ground that a press entity is not entitled to a special exemption from content-neutral governmental actions."); *see also* Reporters' Comm. for Freedom of the Press v. AT&T, 593 F.2d 1030 (D.C. Cir. 1978) (rejecting reporters' argument that they should not be required to turn over subpoenaed phone records containing conversations with sources under a freedom of association theory).

227. 530 U.S. 640, 648 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

the reasonable access rules meet all these criteria.[228] Thus, even if the Proposal required a cable station with a particular point of view to run an advertisement by a candidate whose views were antithetical to its own, it would not be found to be unconstitutional under the freedom of expressive association doctrine.

VII. CONCLUSION

The single most important quality a candidate must possess to have any chance of electoral success should not be access to money. But that describes today's reality. As television broadcast stations—the primary source through which Americans receive their news—continually reduce their coverage of campaigns, candidates must depend on increasingly expensive television advertisements to reach voters. The answer to this problem, however, is not reducing the amount of money in politics—it is pumping *more* money into campaigns. In the thirty years since the enactment of the Watergate-era reform measures, it has become clear that money will always find its way around the rules and into the campaign system, despite efforts to ban it—a point made by the Supreme Court in its recent decision in the campaign finance reform case, *McConnell v. FEC*.[229] Thus, the solution to the problems facing modern campaigns lies not in attempting to limit better-funded candidates' abilities to spend the money that they can access, but rather in providing resources to those less well-funded candidates who would otherwise have no access to money on their own. By arming such challengers with enough resources to make voters aware of their existence and to get out their messages, the Proposal outlined in this Note should not only increase the number of choices available to voters, but should also provide them with the information required to make meaningful decisions in elections—both of which are essential to the functioning of real democracy. In addition, by incentivizing candidate use of media not typically used in campaigns, such as the Internet and cable television, the Proposal seeks both to break the stranglehold of broadcast television advertising while also advancing media that are particularly conducive to fostering a robust discourse between candidates and voters.

Today, the democratic process in the United States is broken—but it is not beyond repair. This Note's Proposal constitutes a critical first step in the long process of fixing it.

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228. *See supra* notes 206-219 and accompanying text.

229. 124 S Ct. 619 (2003). The Court's opinion, written by Justices Stevens and O'Connor, stated, "We are under no illusion that [the Bipartisan Campaign Reform Act (BCRA)] will be the last congressional statement on the matter. Money, like water, will always find an outlet." *Id.* at 706. *See also* Nick Anderson & Janet Hook, *Big Money's Spigot Will Stay Open*, L.A. TIMES, Dec. 11, 2003, at 1 ("[A]s opponents of [the BCRA] predicted, much of that [banned] money is finding its way back into the political system through other means.").